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No.

In The
Supreme Court of the United States

PETER CLAYTON McCLENDON,

Petitioner,

v.

CITY OF COLUMBIA and JAMES R. CARNEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

KATHRYN N. NESTER
Counsel of Record
CHRISTOPHER & NESTER, PLLC
P.O. Box 982
Ridgeland, Mississippi 39158
(601) 898-3303

GLENN L. WHITE
HOLMES & WHITE
P.O. Box 662
Petal, Mississippi 39465
(601) 544-8855

Attorneys for Petitioner, Peter Clayton McClendon

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the substantive component of the due process clause guarantees a citizen the right to be free from acts of violence inflicted by a third party when the state actor played an affirmative role in creating or exacerbating the dangerous situation that led to the citizen's injury?

2. Whether a police officer who affirmatively abused his authority by providing a gun to a confidential informant, known to be involved with gangs and drugs, while knowing that a confrontation with a specific individual was imminent, acted with the requisite culpability to be held liable under 42 U.S.C. § 1983?

3. Whether the contours of an individual's right to be free from state-created danger are sufficiently clearly established to defeat a claim of qualified immunity when the Fifth Circuit has acknowledged the state-created danger theory of liability but not yet explicitly adopted it or applied it in any case?

4. Whether, in the absence of authority within their own circuit, circuit courts can rely on the authority of other circuits when making the determination of whether a constitutional right is "clearly established" for purposes of a qualified immunity analysis?

5. Whether variations among the circuits as to the specific types of conduct that create liability would preclude a finding that the contours of an individual's right to be free from state-created danger are clearly established?

6. Whether slight variations among the circuits as to the requisite level of culpability in state-created danger cases would preclude a finding that the contours of an individual's right to be free from state-created danger are clearly established?

LIST OF PARTIES

In the proceedings below, Peter Clayton McClendon was the sole Plaintiff. The originally named Defendants included: Detective James Carney (sued individually and in his official capacity), the Columbia Police Department, the City of Columbia, Mayor Harold Bryant (sued individually and in his official capacity), and Chief Joe Sanders of the Columbia Police Department (sued individually and in his official capacity). The Columbia Police Department, Mayor Harold Bryant and Chief Joe Sanders were subsequently voluntarily dismissed as defendants.

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PETITION FOR WRIT OF CERTIORARI

Peter Clayton McClendon respectfully submits this Petition for Writ of Certiorari seeking review of the Opinion issued in this case on September 5, 2002, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The summary judgments issued by the Magistrate Judge have not been designated for publication. (App. 74-92) The panel opinion of the United States Court of Appeals for the Fifth Circuit can be found at 258 F.3d 432 (5th Cir. 2001). (App. 53) The Order granting Detective Carney's Petition for Rehearing *en banc* can be found at 285 F.3d 1078. (App. 93) The *en banc* Opinion issued by the Fifth Circuit, as revised on November 8, 2002, can be found at 305 F.3d 314. (App. 1)

JURISDICTION

On September 5, 2002, the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, entered an opinion affirming the lower court's summary judgments awarded to Detective Carney and the City of Columbia. On November 8, 2002, the Fifth Circuit issued a revised opinion, containing no substantive changes. (App. 1) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clause found in the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, each of which are reproduced below.

Section one of the Fourteenth Amendment to the United States Constitution states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

The specific language of 42 U.S.C. § 1983 is as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory

relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

(a) Statement of Facts Material to Consideration of Questions Presented

On July 12. 1993, Kelvin Loftin (a/k/a "Cheetah") shot Peter McClendon in the face with a gun that belonged to the City of Columbia Police Department. All of the facts relevant to the issues presented to this Court for consideration relate to how and why Loftin came to possess the gun he used to shoot Peter McClendon, who is now permanently blind.

Loftin was a confidential informant for the Columbia Police Department who worked directly for Detective James Carney as a "snitch" in drug cases. Loftin was well known to the police as having a history of intoxication and involvement with gangs. In early July of 1993, Detective Carney knew that Loftin was in a dispute with Peter McClendon because Peter believed Loftin recently gave his brother-in-law a gun that was used to shoot Peter's cousin. In his deposition, Loftin recalled what he told Officer Carney as follows:

> **"This was heating up. I let them know the man was fixing to try me. He was looking at my wife. He was fixing to try me sooner or later. . . . It was at a boiling point." (App. 95-97)**

In response to Loftin's comments, Detective Carney "loaned" Loftin a gun that he retrieved from his desk drawer at the police station. (App. 98-101) The gun had been seized by the Columbia Police Department during the execution of a search warrant and was the property of the Columbia Police Department. Carney admitted that prior to loaning Loftin the gun, he was so concerned about the possibility of violence between McClendon and Loftin that he suggested Loftin leave town. (App. 98-101) Approximately one week after Carney provided Loftin the gun, Loftin used it to shoot Peter McClendon in the face. Loftin was subsequently convicted of aggravated assault against Peter McClendon.

At the time Detective Carney provided Loftin with the weapon that he used to shoot McClendon, this Court had already suggested in *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 201 (1989), that a state actor might be held liable for acts of private parties in circumstances where the state actor creates the danger or takes steps to make the victim more vulnerable to the danger. Furthermore, the Fifth Circuit had acknowledged less than a year before the shooting that "[c]ourts have found a denial of due process when the state creates the faced dangers." *Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992). Finally, prior to 1993, several circuits had explicitly adopted the "state-created danger" theory of liability, relying on this Court's opinion in *DeShaney*.[1]

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[1] *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2442 (1993); *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006 (8th Cir. 1992) (*en banc*); *D.R. v. Middle Bucks Area Vo. Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Gibson v. City of Chicago,*

(Continued on following page)

These historical developments in the progression of the state-created danger theory of liability are critical to this Court's determination of whether the contours of McClendon's right to be free from state-created danger were clearly established at the time Detective Carney gave Loftin the gun, such that Loftin should have been aware that his actions violated McClendon's constitutional right.

(b) Basis for Federal Jurisdiction in the Court Below

On July 11, 1996, Peter McClendon filed the instant 42 U.S.C. § 1983 action in the United States District Court for the Southern District of Mississippi, Hattiesburg Division. The Complaint alleged the following: 1) Detective Carney violated McClendon's due process rights under the Fourteenth Amendment by knowingly and affirmatively creating a dangerous situation that resulted in injury to McClendon, 2) the City of Columbia's custom and practice of allowing unabated access to evidence proximately caused McClendon's injury, and 3) the City's failure to train or supervise Carney displayed deliberate indifference to McClendon's rights and proximately caused his injury.

On April 20, 1999, the Magistrate Judge (having been selected to hear the case pursuant to the consent of the parties) entered an order granting summary judgment to Detective James Carney. (App. 74) McClendon attempted to appeal the summary judgment to the Fifth Circuit but

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910 F.2d 1510 (7th Cir. 1990); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 368 (6th Cir. 1987) (*abrogated on other grounds*), *Lewellen v. Metropolitan Gov't of Nashville*, 34 F.3d 345 (6th Cir. 1994); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1990).

the appeal was dismissed because the claims pending against the City had not yet been adjudicated. The City subsequently obtained permission from the Magistrate Judge to file a motion for summary judgment out of time. On March 6, 2000, the Magistrate Judge awarded summary judgment to the City of Columbia. (App. 83)

McClendon appealed both summary judgments to the United States Court of Appeals for the Fifth Circuit. On July 26, 2001, the Fifth Circuit panel assigned to hear the case affirmed the summary judgment awarded to the City of Columbia but reversed the summary judgment awarded to Detective James Carney. (App. 53) Carney then filed a Petition for Rehearing *en banc*. On March 13, 2002, Detective James Carney's Petition for Rehearing *en banc* was granted and oral arguments were granted. (App. 93) On September 5, 2002, the *en banc* Court issued a *per curiam* decision reversing the panel's decision and affirming the Magistrate Judge's awards of summary judgment to both Detective Carney and the City of Columbia. (App. 1) Circuit Judges Parker, Wiener and DeMoss joined in a dissent, with Circuit Judge Wiener authoring an additional, separate dissent.

REASONS FOR GRANTING WRIT

I. THE FIFTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND THIS COURT BY REFUSING TO HOLD THAT THE STATE-CREATED DANGER THEORY OF LIABILITY IS A VIABLE THEORY.

Prior to this Court's holding in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), as a general rule a state official had no constitutional duty to protect an individual from private violence. *Id.* at 197. However, in *DeShaney* this Court clarified that this general rule is not absolute and explicitly adopted an exception in cases where there is a "special relationship" between the individual and the State, which imposes some duty on the State to protect that individual. This Court went on to propose a second exception when it stated: "[w]hile the State may have been aware of the dangers that [the child] faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*" Over the next decade, the majority of the circuits went on to interpret this language as the creation of a second exception to the general rule in cases where the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury.[2]

With one simple sentence, the case of *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) gave birth to a new generation of 42 U.S.C. § 1983 cases

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[2] *See* (App. 13, footnote 6).

across the country. Yet, over the past ten years, whenever the Fifth Circuit was given the opportunity to join its sister circuits and explicitly adopt the state-created danger theory, the Fifth Circuit steadfastly refused to adopt the state-created danger theory as a viable cause of action.[3] Using a methodology that the dissenters to the *en banc* opinion in this case called indefensible and insidious (App. 33, 40), the Fifth Circuit chose instead to rule in each case that the Plaintiff had failed to show facts that amounted to liability without explicitly adopting or rejecting the state-created danger doctrine. (App. 34-35)

In the *en banc* majority opinion in this case, the Fifth Circuit refused to acknowledge that the other circuits have correctly interpreted *DeShaney* and instead admitted "we have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers." (App. 15) The dissenters to the *en banc* opinion in this case argued that the Fifth Circuit's refusal to adopt or reject the state-created danger doctrine after a decade of discussion about it and the majority of circuits have adopted it, at best, has left this area of circuit law in a perpetual state of confusion and, at worst, is an attempt at subterfuge designed to prevent any state actors from ever being held liable under this theory in the Fifth Circuit.

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[3] *See, e.g., Piotrowski v. City of Houston,* 237 F.3d 567, 584 (5th Cir. 2001) (noting that the Fifth Circuit has never adopted the state-created danger theory); *Randolph v. Cervantes,* 130 F.3d 727, 731 (5th Cir. 1997) (same); *Doe v. Hillsboro Indep. Sch. Dist.,* 113 F.3d 1412, 1415 (5th Cir. 1997); *Piotrowski v. City of Houston,* 51 F.3d 512, 515-17; *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 530 (5th Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992).

(App. 33, 40) Certainly, the Fifth Circuit's refusal to adopt the state-created danger theory conflicts with this Court's clear message in *DeShaney*.

Because this Court has provided no guidance in the area of the state-created danger doctrine since *DeShaney*, subtle differences in the elements required to prove liability have sprung up throughout the circuits. Although the vast majority of the circuits have embraced this general theory of liability, the Fifth Circuit is relying on these variances across the circuits as its implied justification for its failure to adopt the theory. Specifically, the majority opinion listed the various tests that have been adopted by the different circuits in determining whether state-created danger existed. (App. 14, footnote 7) This confusion among the circuits on these important federal questions should be resolved by this Court.

It is time for this Honorable Court to clear up any doubt remaining with the majority of the Fifth Circuit and use the present case as a vehicle to explain the reach of *DeShaney*. Furthermore, litigants in the Fifth Circuit deserve a decision from the Fifth Circuit indicating once and for all whether the state-created danger doctrine will ever be applied, and under what circumstances.

II. THE FIFTH CIRCUIT HAS DECIDED THE IMPORTANT FEDERAL QUESTION OF HOW TO DETERMINE WHETHER THE CONTOURS OF A CONSTITUTIONAL RIGHT ARE "CLEARLY ESTABLISHED" IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In the case of *Hope v. Pelzer*, 122 S.Ct. 2508 (2002), this Court sent a clear message to the circuit courts that

the "clearly established" prong of the qualified immunity inquiry does not require that the very action in question must have previously been held unlawful. *Hope* at 2516. Despite that unequivocal ruling, the Fifth Circuit explained in great detail the differences among the factual circumstances in pre-1993 state-created danger cases and Officer Carney's behavior in the present case and argued that since no prior case contained facts like the present case, Carney could not have been placed on notice that his conduct was unlawful. (App. 29)

The dissenters were shocked by the majority's suggestion that a police officer would not have known that providing a seized weapon to an informant known to be involved with gangs and drugs, when the informant made it clear that a confrontation with McClendon was imminent, was conduct likely to deprive McClendon of a clearly established constitutional right. The dissenters agreed that the facts in this case presented "the worst state-created danger case we have ever seen." (App. 34, footnote 16) Still, the majority refused to apply the directive in *Hope v. Pelzer* and instead extended the protection of qualified immunity beyond all reasonable bounds.

The Fifth Circuit's conclusion that McClendon's right to be free from state-created danger was not clearly established at the time of Carney's actions also flies in the face of this Court's ruling in *Wilson v. Layne*, 526 U.S. 603 (1999). In *Wilson*, this Court endeavored to avoid the exact scenario that is occurring in this case – that is, the scenario where a state actor cloaks himself with qualified immunity simply because his is a case of first impression, even when a consensus of circuits agrees that a particular constitutional right is clearly established. The majority purports to follow *Wilson v. Layne*; however, the majority

turns right around and searches for subtle differences in ways the circuits *apply* the state-created danger doctrine to support its argument that there is no consensus among the circuits. (App. 27-30) The majority cannot dispute that the vast majority of the circuits have adopted the general theory of state-created danger as originally defined by *DeShaney*. The majority's conclusion that because slight variations existed among the circuits concerning the level of culpability required to hold the state actor constitutionally liable precludes a finding of a consensus of persuasive authority is plainly inconsistent with the more liberal approach to the "clearly established law" inquiry as set forth in *Wilson*.

Should this Honorable Court take this case under consideration, it would have the opportunity to correct the Fifth Circuit's refusal to follow this Court's precedent of interpreting qualified immunity in such a way that clearly egregious behavior of state actors and clear abuses of governmental authority have a constitutional remedy available to litigants across the country.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KATHRYN N. NESTER
Counsel of Record
CHRISTOPHER & NESTER, PLLC
P.O. Box 982
Ridgeland, Mississippi 39158
(601) 898-3303

GLENN L. WHITE
HOLMES & WHITE
P.O. Box 662
Petal, Mississippi 39465
(601)-544-8855

Attorneys for Petitioner,
Peter Clayton McClendon

REVISED NOVEMBER 8, 2002
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60256

PETER CLAYTON MCCLENDON

Plaintiff-Appellant

v.

CITY OF COLUMBIA; ET AL

Defendants

CITY OF COLUMBIA; JAMES R CARNEY

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

September 5, 2002

Before KING, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, DENNIS and CLEMENT, Circuit Judges.

PER CURIAM:*

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* This opinion is joined by Chief Judge King and Circuit Judges Jolly, Higginbotham, Davis, Jones, Smith, Barksdale, Benavides, Stewart, Dennis and Clement.

In July 1993, Defendant-Appellee Detective James Carney, a City of Columbia police detective, loaned a gun to Kevin Loftin, an informant for the Columbia Police Department, to enable Loftin to protect himself from Plaintiff-Appellant Peter McClendon. Loftin subsequently used the gun to shoot McClendon. A panel of this court held that Detective Carney thereby violated McClendon's substantive due process rights and that the unconstitutionality of Detective Carney's conduct was clearly established at the time of his actions. *See McClendon v. City of Columbia,* 258 F.3d 432, 441-43 (5th Cir. 2001), *vacated and reh'g en banc granted,* 285 F.3d 1078 (5th Cir. 2002). We took this case en banc to determine whether the panel's conclusions were correct. En banc review is also warranted to resolve conflicting panel decisions addressing when a principle of law should be deemed "clearly established" in the context of qualified immunity analysis. Because under the facts established by the summary judgment record, viewed in the light most favorable to McClendon, there is no constitutional violation, we find that Detective Carney is entitled to qualified immunity. We further find, in the alternative, that even if those facts did establish a constitutional violation under current law, Detective Carney is nonetheless entitled to qualified immunity because his conduct was not objectively unreasonable in light of the law that was clearly established at the time of his actions. Accordingly, we AFFIRM the district court's summary judgment in favor of Detective Carney on qualified immunity grounds. In addition, we AFFIRM the district court's summary judgment in favor of Defendant-Appellee the City of Columbia, reinstating the portion of the panel opinion addressing this aspect of the district court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because the district court awarded summary judgment to the Defendants-Appellees, we view the facts in the light most favorable to Plaintiff-Appellant Peter McClendon. *See Stults v. Conoco, Inc.*, 76 F.3d 651, 654 (5th Cir. 1996). Between May of 1992 and December of 1993, Defendant-Appellee Detective James Carney ("Detective Carney") paid Kelvin Loftin to serve as an informant for the Columbia Police Department (the "CPD"). Loftin assisted Detective Carney and the CPD with drug enforcement investigations. During the week prior to July 12, 1993, Loftin spoke to Detective Carney about a conflict that had developed between Loftin and McClendon. Specifically, Loftin feared that McClendon might retaliate against Loftin for supplying a gun to an individual who subsequently shot McClendon's friend. Loftin told Detective Carney that McClendon was "fixing to try [Loftin]," and that the situation between the two men was at a "boiling point." Upon hearing about the situation, Detective Carney loaned Loftin a handgun so that Loftin could protect himself from McClendon. This handgun, which Detective Carney retrieved from his desk drawer, was apparently seized by the CPD as evidence in an unrelated investigation.

On the evening of July 12, 1993, McClendon and Loftin encountered each other (apparently by chance) at the Hendrix Street Apartments, where Loftin was staying. An altercation ensued, and Loftin shot McClendon in the face with the handgun that Loftin had obtained from Detective Carney. McClendon is now permanently blind as a result of the incident.

On July 11, 1996, McClendon filed the instant 42 U.S.C. § 1983 action in federal district court against Detective Carney, the CPD, the City of Columbia ("the City"), City of Columbia Mayor Harold Bryant ("Mayor Bryant"), and CPD Chief of Police Joe Sanders ("Chief Sanders") (collectively, "the Defendants").[1] The complaint alleges that the Defendants violated McClendon's due process rights under the Fourteenth Amendment by knowingly and affirmatively creating a dangerous situation that resulted in injury to McClendon and by failing to take reasonable steps to diffuse this danger.[2] Regarding Detective Carney, the complaint specifically contends that in providing Loftin with a handgun, Detective Carney "created a serious danger" that "caused Peter McClendon harm and violated McClendon's due process rights." Regarding the City, the complaint further alleges: (1) that the City had a custom or practice of allowing unabated access to evidence and evidence storage areas, which custom or practice proximately caused McClendon's injury by allowing Detective Carney to provide Loftin with the handgun used in the assault; and (2) that the City's failure to train Detective Carney regarding the use of informants displayed deliberate indifference to McClendon's rights and proximately caused McClendon's injury.

On December 31, 1998, Detective Carney moved for summary judgment, arguing that he did not violate McClendon's constitutional rights because his actions did

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[1] Detective Carney, Mayor Bryant, and Chief Sanders were sued in both their individual and official capacities.

[2] The CPD, Mayor Bryant, and Chief Sanders were subsequently voluntarily dismissed as defendants.

not create the danger which resulted in McClendon's injuries. Detective Carney alternatively argued that he was entitled to qualified immunity from the suit because the unlawfulness of his actions was not clearly established as of July 12, 1993.

On April 20, 1999, the district court granted summary judgment to Detective Carney, holding that McClendon had not stated a viable constitutional claim. The court rejected McClendon's attempt to seek recovery from the state for injuries inflicted by a private actor under a "state-created danger" theory, explaining that the Fifth Circuit had not sanctioned such a theory of substantive due process liability. The court also found that, even if McClendon could maintain a viable constitutional claim based on a state-created danger theory, this claim would fail because Detective Carney "did not affirmatively place McClendon in a position of danger, stripping him of his ability to defend himself, and he did not cut off McClendon's potential sources of private aid." In the alternative, the district court determined that Detective Carney was entitled to qualified immunity from suit because his conduct was "objectively reasonable under the circumstances in light of clearly established law" in July of 1993.

McClendon attempted to appeal from this April 20, 1999 order, but this appeal was dismissed because McClendon's claims against the City had not yet been adjudicated. The City subsequently obtained permission from the district court to file a motion for summary judgment out of time. The City filed this motion on November 2, 1999, arguing that McClendon had not shown a city policy or custom that produced his injury and had not shown that the City acted with deliberate indifference to

his safety. On March 6, 2000, the district court granted summary judgment to the City, finding: (1) that McClendon had not pled the facts of his "dangerous custom or practice" claim with sufficient particularity and, alternatively, had not demonstrated a custom or practice (as opposed to an isolated incident) that resulted in a deprivation of federal rights; and (2) that McClendon had not properly established the elements of an "inadequate training" claim under *Gabriel v. City of Plano* because he failed to provide proof of "the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training." *Gabriel,* 202 F.3d 741, 745 (5th Cir. 2000).

McClendon appealed the district court's summary judgments in favor of Detective Carney and the City. A panel of this court affirmed the summary judgment in favor of the City,[3] but reversed the summary judgment in favor of Detective Carney, finding that McClendon could state a viable substantive due process claim if Detective Carney used his authority to engage in affirmative conduct (1) that he knew would create a danger to McClendon, increase a danger to McClendon, or make McClendon more vulnerable to a pre-existing danger, and (2) that was causally connected to McClendon's injuries.

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[3] Because the portion of the panel opinion affirming summary judgment in favor of the City is soundly reasoned and does not implicate the same unsettled questions of law as the portions of that opinion addressing the claims against Detective Carney, we REINSTATE that portion of the panel opinion affirming summary judgment in favor of the City. *See McClendon v. City of Columbia,* 258 F.3d 432, 441-43 (5th Cir. 2001).

See McClendon, 258 F.3d at 435, 438. The panel determined that McClendon had adduced sufficient evidence to create a genuine issue of material fact suggesting that Detective Carney had violated McClendon's constitutional rights.

The panel acknowledged that Detective Carney would nonetheless be entitled to qualified immunity if his conduct was objectively reasonable in light of the law that was clearly established at the time of his actions. *Id.* at 438. The panel also implicitly acknowledged that neither the Supreme Court nor this court had expressly sanctioned any "state-created danger" theory as of July 1993, when the relevant events took place. *Id.* at 435, 438. However, the panel found that this court's discussion of the state-created danger theory in *Salas v. Carpenter,* 980 F.2d 299, 309-10 (5th Cir. 1992), combined with (1) the fact that several circuits had explicitly adopted the state-created danger theory prior to 1993, and (2) the fact that no circuit had explicitly rejected the state-created danger theory prior to 1993, was sufficient to render that theory "clearly established" in July of 1993.[4] Concluding that

[4] Relying on *Melear v. Spears,* the panel explained that this court is not limited to examining only its own precedent and Supreme Court precedent in determining whether a principle of law was clearly established. *See* 862 F.2d 1177, 1184 n.8 (5th Cir. 1989) ("As a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries.") (internal citation omitted). Thus, the panel found that a theory not explicitly adopted by this court could nonetheless constitute clearly established law based on "overwhelming authority" from other circuits at the time in question. This discussion in *Melear* is in tension with our subsequent decision in *Shipp*

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clearly established law put Detective Carney on notice that "a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed was subject to liability for a violation of the victim's rights" resulting from that danger, the panel found that Detective Carney's actions were unreasonable in light of clearly established law, and that he was not entitled to qualified immunity. *McClendon,* 258 F.3d at 441.

To assess the correctness of the panel's holdings and to resolve the conflict in our circuit authority addressing what constitutes "clearly established law" for the purposes of qualified immunity analysis, we granted Carney's request to rehear the case en banc. We review the district court's grant of summary judgment in favor of Detective Carney de novo, applying the same standard as the district court. *See Rivers v. Cent. & S.W. Corp.,* 186 F.3d 681, 683 (5th Cir. 1999). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

II. THE QUALIFIED IMMUNITY FRAMEWORK

Section 1983 provides a cause of action for individuals who have been "depriv[ed] of any rights, privileges, or

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v. McMahon, which holds that this court's inquiry into whether a principle of law was clearly established is "confined to precedent from our circuit or the Supreme Court." 234 F.3d 907, 915 (5th Cir. 2000) (citing *Boddie v. City of Columbus,* 989 F.2d 745, 748 (5th Cir. 1993)).

immunities secured by the Constitution and laws" of the United States by a person or entity acting under color of state law. 42 U.S.C. § 1983 (1994). In the instant case, McClendon claims that Detective Carney violated McClendon's right to bodily integrity under the substantive component of the Due Process Clause of the Fourteenth Amendment because Carney's affirmative misconduct enhanced the risk of harm to McClendon.[5] Specifically, McClendon argues: (1) that Detective Carney knowingly and affirmatively created a dangerous situation by providing Loftin with a gun; (2) that Detective Carney failed to take any reasonable steps to diffuse the danger; and (3) that Detective Carney abused his authority by creating an opportunity for Loftin to harm McClendon that would not otherwise have existed.

Detective Carney maintains that he is entitled to summary judgment because he is shielded from liability by the doctrine of qualified immunity. In *Harlow v. Fitzgerald,* the Supreme Court established that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would

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[5] This substantive component of the Fourteenth Amendment's Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams,* 474 U.S. 327, 331 (1986)). This court has recognized a substantive due process right to be free from state-occasioned damage to a person's bodily integrity in certain contexts. *See, e.g., Doe v. Taylor Indep. Sch. Dist.,* 15 F.3d 443, 450-51 (5th Cir. 1994) (en banc).

have known." 457 U.S. 800, 818 (1982). The Court subsequently clarified in *Siegert v. Gilley,* 500 U.S. 226, 232-34 (1991) that courts evaluating § 1983 claims based on allegedly unconstitutional conduct by state actors should conduct a two-prong inquiry to determine whether the state actors are entitled to qualified immunity. "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged." *Saucier v. Katz,* 533 U.S. 194, 200 (2001). "[I]f a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established." *Id.* at 201. Ultimately, a state actor is entitled to qualified immunity if his or her conduct was objectively reasonable in light of the legal rules that were clearly established at the time of his or her actions. *See Wilson v. Layne,* 526 U.S. 603, 614 (1999) (citing *Anderson v. Creighton,* 483 U.S. 635, 639 (1987)).

When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense. *See Bazan ex rel. Bazan v. Hidalgo County,* 246 F.3d 481, 489 (5th Cir. 2001). Because qualified immunity constitutes an "*immunity from suit* rather than a mere defense to liability," *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985) (emphasis in original), the defense is intended to give government officials a right not merely to avoid standing trial, but also to avoid the burdens of "such pretrial matters as discovery . . . as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Id.* (quoting *Harlow,* 457 U.S. at 817) (alterations in original). Thus, adjudication of qualified immunity claims should occur "at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991). However, "the legally relevant factors bearing upon the *Harlow* question will be

different on summary judgment than on an earlier motion to dismiss." *Behrens v. Pelletier,* 516 U.S. 299, 309 (1996). At the earlier stage, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.'" *Id.* "On summary judgment, however, the plaintiff can no longer rest on the pleadings . . . and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry." *Id.*

In the instant case, Detective Carney raised the defense of qualified immunity in a motion for summary judgment after significant discovery. Accordingly, this court's task is to examine the summary judgment record and determine whether McClendon has adduced sufficient evidence to raise a genuine issue of material fact suggesting (1) that Detective Carney's conduct violated an actual constitutional right; and (2) that Detective Carney's conduct was objectively unreasonable in light of law that was clearly established at the time of his actions.

III. DID DETECTIVE CARNEY'S CONDUCT VIOLATE AN ACTUAL CONSTITUTIONAL RIGHT?

In assessing whether the facts alleged demonstrate a constitutional violation, we analyze the law using "the currently applicable . . . standards." *Hare v. City of Corinth,* 135 F.3d 320, 326 (5th Cir. 1998) (quoting *Rankin v. Klevenhagen,* 5 F.3d 103, 106 (5th Cir. 1993)) (internal quotations omitted). McClendon claims that Detective Carney violated McClendon's right to bodily integrity under the substantive component of the Due Process Clause of the Fourteenth Amendment. While McClendon does not allege that Detective Carney directly injured

McClendon in any way, McClendon maintains that Detective Carney's actions were nonetheless unconstitutional because Carney's conduct enhanced the risk that McClendon would be harmed by a private actor (i.e., Loftin).

Ordinarily, a state official has no constitutional duty to protect an individual from private violence. *See DeShaney v. Winnebago County Dep't of Soc. Servs.* 489 U.S. 189, 197 (1989) (holding that, as a general matter, a state's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause"). In *DeShaney,* however, the Court clarified that this general rule is not absolute: "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198. When the state, through the affirmative exercise of its powers, acts to restrain an individual's freedom to act on his own behalf "through incarceration, institutionalization, or other similar restraint of personal liberty," the state creates a "special relationship" between the individual and the state which imposes upon the state a constitutional duty to protect that individual from dangers, including, in certain circumstances, private violence. *Id.* at 200.

A number of courts have read the Court's opinion in *DeShaney* to suggest a second exception to the general rule against state liability for private violence. *DeShaney* involved a § 1983 action brought on behalf of a child against state social workers. The child, who suffered serious injuries as a result of parental abuse, alleged that the social workers had violated his substantive due process rights because they were aware of the probability of abuse and failed to intervene to protect him or remove him

from his father's home. *Id.* at 191. In rejecting this claim on the ground that there was no "special relationship" between the child and the state, the Supreme Court also noted that, "[w]hile the State may have been aware of the dangers that [the child] faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.*" *Id.* at 201 (emphasis added). Many of our sister circuits have read this language to suggest that state officials can have a duty to protect an individual from injuries inflicted by a third party if the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury. Those courts accepting some version of this "state-created danger" theory have applied the exception in a variety of factual contexts,[6] and have adopted a variety

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[6] *See, e.g., Butera v. District of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001) (adopting the state-created danger theory, but rejecting a § 1983 claim brought against a police department and individual officers on behalf of an individual who was shot while working as an undercover operative for the department); *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066-67 (6th Cir. 1998) (adopting the state-created danger theory in the context of a § 1983 claim brought by undercover police officers alleging that city officials released personal information from their personnel files to the drug conspirators that the officers were investigating); *Kneipp v. Tedder,* 95 F.3d 1199, 1201, 1208 (3d Cir. 1996) (adopting the state-created danger theory in the context of a § 1983 claim brought against a city and police officers on behalf of a woman who suffered brain damage when the officers allegedly left her alone to walk home on a cold night while she was intoxicated); *Uhlrig v. Harder,* 64 F.3d 567, 572 (10th Cir. 1995) (accepting the state-created danger theory, but rejecting a § 1983 claim brought against state mental health officials on behalf of an activity therapist who was killed by a mental hospital patient); *Reed v. Gardner,* 986 F.2d 1122, 1125 (7th Cir. 1993) (adopting the state-created danger theory in the context of a § 1983 claim brought by motorists who were injured in an automobile collision with an allegedly drunk driver against police officers who had

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of tests in expounding the theory.[7] While this court has recognized the validity of the "special relationship"

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previously failed to arrest the driver); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993) (adopting the state-created danger theory in the context of a § 1983 claim brought by demonstrators against police officers who allegedly conspired to permit a group of "skinheads" to assault the demonstrators with impunity); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990) (adopting the state-created danger theory in the context of a § 1983 claim brought on behalf of a woman killed by her estranged husband against a police chief who allegedly directed his officers to ignore her pleas for police assistance); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 356 (11th Cir. 1989) (*overuled on other grounds by White v. Lemacks*, 183 F.3d 1253, 1256 (11th Cir. 1999)) (adopting the state-created danger theory in the context of a § 1983 claim brought against town and prison officials by a town clerk who was abducted and terrorized by prison inmates assigned to a community work program); *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) (adopting the state-created danger theory in the context of a § 1983 claim brought against police officers by the passenger of an impounded vehicle who was raped after officers allegedly abandoned her on the side of the road).

[7] *See, e.g., Kallstrom*, 136 F.3d at 1066 ("Liability under the state-created-danger theory is predicted upon affirmative acts by the state which either create of increase the risk that an individual will be exposed to private acts of violence . . . [W]e require plaintiffs alleging a constitutional tort under § 1983 to show "special danger" in the absence of a special relationship between the state and either the victim or the private tortfeasor. The victim faces "special danger where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large."); *Kneipp*, 95 F.3d at 1208 ("[C]ases predicating constitutional liability on a state-created danger theory have four common elements: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.") (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995)) (internal quotations omitted); *Uhlrig*, 64 F.3d at 574 ("Plaintiff must demonstrate that (1)[he] was a member of a limited and specifically definable group; (2)

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exception to the general *DeShaney* rule that state officials have no constitutional duty to protect individuals from private violence, *see, e.g., Walton v. Alexander,* 44 F.3d 1297, 1299 (5th Cir. 1995), we have not yet determined whether a state official has a similar duty to protect individuals from state-created dangers, *see, e.g., Piotrowski v. City of Houston* ("*Piotrowski II*"), 237 F.3d 567, 584 (5th Cir. 2001) (noting that this court has never adopted the state-created danger theory); *Randolph v. Cervantes,* 130 F.3d 727, 731 (5th Cir. 1997) (same).

Regardless of the theory of liability that a plaintiff is pursuing, in order to state a viable substantive due process claim the plaintiff must demonstrate that the state official acted with culpability beyond mere negligence. The Supreme Court's discussions of abusive executive action have repeatedly emphasized that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998) (quoting *Collins,* 503 U.S. at 129) (internal quotations omitted). The Court has "spoken of the

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Defendants' conduct put [him] and the other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking."); *Reed,* 986 F.2d at 1126 ("[P]laintiffs . . . may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been."); *Freeman,* 911 F.2d at 55 ("[A] constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increased the individual's danger of, or vulnerability to, such violence beyond the level it would have been absent state action.")

cognizable level of executive abuse of power as that which shocks the conscience." *Id.* In elaborating on "the constitutional concept of conscience shocking," the Court has "made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Id.* at 848. "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.*

Consistent with these principles, courts applying both the "special relationship" exception to the *DeShaney* rule and the "state-created danger" exception to the *DeShaney* rule have generally required plaintiffs to demonstrate (or, at the motion-to-dismiss stage, to allege) that the defendant state official *at a minimum* acted with deliberate indifference toward the plaintiff.[8] *See, e.g., Butera v. District of Columbia,* 235 F.3d 637, 652 (D.C. Cir. 2001) (state-created danger); *Nicini v. Morra,* 212 F.3d 798, 810 (3d Cir. 2000) (special relationship); *Huffman v. County of Los Angeles,* 147 F.3d 1054, 1059 (9th Cir. 1998) (state-created danger).

Our examination of the summary judgment record reveals (in accordance with the conclusion of the district court) that McClendon has not adduced any evidence

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[8] To act with deliberate indifference, a state actor must "know[ ] of and disregard[ ] an excessive risk to [the victim's] health or safety." *Ewolski v. City of Brunswick,* 287 F.3d 492, 513 (6th Cir. 2002) (quoting *Farmer v. Brennan,* 511 U.S. 825, 837 (1994)) (internal quotations omitted). The state actor's actual knowledge is critical to the inquiry. A state actor's failure to alleviate "a significant risk that he should have perceived but did not," while "no cause for commendation," does not rise to the level of deliberate indifference. *Farmer,* 511 U.S. at 837.

suggesting that Detective Carney acted with anything other than ordinary negligence in the instant case. While Detective Carney was informed that McClendon potentially posed a threat to Loftin's safety, there is no indication that Detective Carney was aware that Loftin had any violent intentions toward McClendon. Indeed, Loftin had no criminal history and had a longstanding, positive working relationship with Detective Carney as a confidential informant. Moreover, given that Detective Carney had no reason to anticipate that Loftin and McClendon would have a chance encounter at the Hendrix Street Apartments, Detective Carney could not have predicted that Loftin would have the opportunity to assault McClendon with the gun that Detective Carney loaned Loftin for self-protection. Thus, while Detective Carney's actions in providing Loftin with a gun were certainly inadvisable, there is no evidence in the record suggesting that he acted with knowledge that his conduct would pose a threat to McClendon's safety. Under these circumstances, no rational trier of fact could find that Detective Carney acted with any level of culpability beyond mere negligence.

Thus, under the facts established by the summary judgment record, viewed in the light most favorable to McClendon, there is no violation by Detective Carney of McClendon's substantive due process rights. Negligent infliction of harm by a state actor does not rise to the level of a substantive due process violation, regardless whether the plaintiff's injury was inflicted directly by a state actor or by a third party. Because the facts alleged by McClendon, as supplemented by the summary judgment record, do not demonstrate the violation of an actual constitutional right, Detective Carney is entitled to summary judgment on grounds of qualified immunity.

IV. WAS DETECTIVE CARNEY'S CONDUCT OBJECTIVELY UNREASONABLE IN LIGHT OF CLEARLY ESTABLISHED LAW?

Even if we were to find, contrary to our above conclusion, that McClendon had established a viable constitutional claim under current law, summary judgment in favor of Detective Carney on grounds of qualified immunity is nonetheless appropriate because Detective Carney's conduct was not objectively unreasonable in light of clearly established law at the time of his actions.[9]

As noted above, "government officials performing discretionary functions generally . . . are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson,* 526 U.S. at 614 (quoting *Harlow,* 457 U.S. at 818). "What this means in practice is that whether an official protected by qualified immunity may be held personally

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[9] Normally, we proceed to the second prong of the *Siegert* analysis only if we decide, under the first prong, that the defendant engaged in constitutionally impermissible conduct. *See, e.g., Saucier,* 533 U.S. at 201 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity."); *accord Roe v. Tex. Dep't of Protective and Regulatory Servs.,* 299 F.3d 395, 401 (5th Cir. 2002). We make an exception for our alternative holding here, because of the need to articulate whether it is appropriate, when this circuit has not spoken to an issue, to look to the law of other circuits in determining whether a right was "clearly established." While this alternative holding is binding precedent, *see Williams v. Cain,* 229 F.3d 468, 474 n.5 (5th Cir. 2000) (noting that alternative holdings are binding precedent in this circuit), we emphasize that such alternative analysis should be rare in qualified immunity cases and should not be undertaken routinely by the panels of this court.

liable for an allegedly unlawful action generally turns on the 'objective legal reasonableness' of the official's action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 639 (1987)).

McClendon concedes that, at the time of Detective Carney's allegedly unlawful conduct in July of 1993, neither the Supreme Court nor this court had expressly adopted the "state-created danger" theory of substantive due process liability.[10] Indeed, as noted above, neither this court nor the Supreme Court has yet determined whether a citizen has a constitutional right to be free from state-created dangers. However, McClendon contends that the viability of the state-created danger theory was clearly established law in July of 1993 because this court had discussed the theory favorably in *Salas v. Carpenter,* 980 F.2d 299, 309 (5th Cir. 1992), and because a number of other federal circuits had expressly adopted the theory. In support of this argument, McClendon relies on *Melear v. Spears,* 862 F.2d 1177 (5th Cir. 1989), in which a panel of this court indicated that it is sometimes appropriate to look outside Fifth Circuit and Supreme Court precedent in determining what constitutes clearly established law. The *Melear* court reasoned:

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[10] We note that if this court had expressly adopted or rejected the state-created danger theory prior to July of 1993 that would, of course, be the end of our inquiry. *See, e.g., Boddie,* 989 F.2d at 748 (noting that, even when there is a split among federal appellate courts regarding the appropriate resolution of a question of law, "[o]ur [qualified immunity] inquiry ends, if we find from examining the decisions of the Supreme Court and our own decisions that the law was clearly established in this circuit").

> As a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions.

Id. at 1185 n.8 (internal citations omitted).

Detective Carney, in contrast, maintains that this court must be guided exclusively by Fifth Circuit and Supreme Court authority in assessing whether the state-created danger theory was clearly established law in July of 1993. In support of this contention, he points to *Shipp v. McMahon,* in which a panel of this court found that "in determining whether a right is clearly established, we are confined to precedent from our circuit or the Supreme Court." 234 F.3d 907, 915 (5th Cir. 2000). Detective Carney accordingly contends that he is entitled to qualified immunity because the state-created danger theory was not clearly established in this circuit in July of 1993.

To resolve this apparent conflict between *Melear* and *Shipp,* we look to the Supreme Court's qualified immunity cases addressing what constitutes clearly established law. The most directly applicable authority is the Court's recent decision in *Wilson v. Layne,* 526 U.S. 603 (1999).

Wilson involved § 1983 actions and actions brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), by homeowners alleging that state and federal law enforcement officers violated the homeowners' Fourth Amendment rights by bringing members of the media into their home to observe and record the officers' attempted execution of an arrest warrant on the homeowners' son. The Fourth Circuit held that the officers were shielded from liability by the doctrine of qualified immunity. *See Wilson v. Layne,* 141 F.3d 111, 115-17 (4th Cir. 1998). On writ of certiorari, the Supreme Court initially concluded that the officers' actions violated the plaintiffs' Fourth Amendment rights under current law. *See* 526 U.S. at 614. The Court then went on to consider whether a reasonable officer could have believed that bringing members of the media into a private home during the execution of an arrest warrant was lawful in light of clearly established law in April of 1992. While conceding that there was no directly controlling Fourth Circuit or Supreme Court authority establishing the illegality of such conduct, the plaintiffs pointed to a decision issued five weeks prior to the officers' actions in which the Sixth Circuit held that police may not bring along third parties during an entry into a private home pursuant to a warrant for purposes unrelated to those justifying the warrant. *See Bills v. Aseltine,* 958 F.2d 697 (6th Cir. 1992). The plaintiffs contended that this decision was persuasive authority sufficient to clearly establish the unlawfulness of the officers' conduct.

The Supreme Court rejected this argument and held that the officers were entitled to qualified immunity, finding that "the law on third-party entry into homes was

[not] clearly established in April 1992." *Wilson,* 526 U.S. at 617. The Court reasoned:

> Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, *nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.*

Id. (emphasis added).[11]

This language in *Wilson* clearly suggests that, in the absence of directly controlling authority, a "consensus of cases of persuasive authority" might, under some circumstances, be sufficient to compel the conclusion that no reasonable officer could have believed that his or her actions were lawful. *See also Medina v. City & County of Denver,* 960 F.2d 1493, 1498 (10th Cir. 1992) ("Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."); *Capoeman v. Reed,* 754 F.2d 1512, 1514 (9th Cir. 1985) ("[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established . . . .").

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[11] The *Wilson* Court also suggested that the Sixth Circuit's decision in *Bills* was not controlling because that decision did not define the Fourth Amendment right invoked by the *Wilson* plaintiffs with sufficient specificity to clearly establish that the officers' conduct violated that right. *Wilson,* 526 U.S. at 615-17.

Because the Supreme Court's method of analysis in *Wilson* is inconsistent with the rule predicated in *Shipp, Shipp* 's statement that "we are confined to precedent from our circuit or the Supreme Court" in analyzing whether a right is clearly established for the purposes of qualified immunity analysis, *see* 234 F.3d at 915, is overruled.

In light of *Wilson,* we must consider both this court's treatment of the state-created danger theory and status of this theory in our sister circuits in assessing whether a reasonable officer would have known at the time of Detective Carney's actions that his conduct was unlawful. As the Supreme Court recently explained in *Hope v. Pelzer,* 122 S. Ct. 2508 (2002), "qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Id.* at 2515 (quoting *Saucier,* 533 U.S. at 206). Thus, the "salient question" under the second prong of the *Siegert* test is "whether the state of the law at the time of the state action gave [the state actors] fair warning that their alleged treatment of the plaintiff was unconstitutional." *Roe,* 299 F.3d at 408-09 (quoting *Hope,* 122 S. Ct. at 2515).

Prior to July of 1993, this court had only once considered a civil rights claim premised on a "state-created danger" theory. In *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), this court considered a § 1983 suit brought by the estate of a slain hostage against the county sheriff who commanded the hostage rescue efforts. The victim claimed that the county sheriff deprived her of her life by preventing city officials from coming to her aid, using incompetent hostage negotiators, and failing to provide adequate weapons and communication equipment to handle the hostage situation. We found that the sheriff was entitled to qualified immunity from suit. In considering the victim's

claim, we recognized that some of our sister circuits had found "a denial of due process when the state creates the . . . dangers" faced by an individual, *id.* at 309 (citing *Gregory v. City of Rogers,* 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc); *L.W. v. Grubbs,* 974 F.2d 119, 121 (9th Cir. 1992); *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989); *White v. Rochford,* 592 F.2d 381 (7th Cir. 1979)), and that at least one court had further found that "a claim may exist when officials increase a person's vulnerability to private violence by interfering with protective services which otherwise would be available," *id.* (citing *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1990)). However, we did not sanction these courts' analyses. Instead, we merely noted that the facts underlying these decisions were distinguishable from the situation facing the sheriff in *Salas.* Unlike the state officials at issue in *Wood, Rochford,* and *Grubbs,* the sheriff "did not worsen [the victim's] position and abandon her to allow events to run their course." *Id.* Determining that no court had found a state official constitutionally liable on a state-created danger theory in a situation sufficiently analogous to the facts at hand, we concluded that the sheriff was entitled to qualified immunity because the *Salas* plaintiffs had failed to state a cognizable constitutional claim.

As we have recognized on numerous subsequent occasions, our decision in *Salas* did not address the viability of the state-created danger theory or define the contours of an individual's right to be free from state-created dangers. *See, e.g., Piotrowski v. City of Houston* ("*Piotrowski I*"), 51 F.3d 512, 515 (5th Cir. 1995); *Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 530-31 (5th Cir. 1994). *Salas* simply held that, even under the most expansive articulations of the state-created danger doctrine

sanctioned by other courts at that time, the plaintiffs had not stated a cognizable claim. This discussion in *Salas* would not have provided a reasonable officer with "fair warning" that creating or increasing a danger to a known victim with deliberate indifference towards that victim violates the victim's substantive due process rights. Furthermore, our *Salas* decision was certainly insufficient to provide a reasonable officer with "fair warning" that Detective Carney's particular actions in loaning Loftin a gun would violate McClendon's substantive due process rights.

Turning to the law of our sister circuits, we note that six circuits had sanctioned some version of the state-created danger theory in July of 1993, at the time of Detective Carney's allegedly unlawful actions. *See, e.g., Dwares v. City of New York,* 985 F.2d 94, 99 (2d Cir. 1993); *Freeman,* 911 F.2d 54-55; *Wood,* 879 F.2d at 596; *Cornelius,* 880 F.2d at 359; *Nishiyama v. Dickson County, Tenn.,* 814 F.2d 277, 282 (6th Cir. 1987) (*overruled on other grounds by Lewellen v. Metro. Gov't of Nashville,* 34 F.3d 345, 349 (6th Cir. 1994)); *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982). Moreover, as McClendon correctly points out, no circuit had explicitly rejected the state-created danger theory in July of 1993. While both of these factors are relevant to our determination whether there was a "consensus of cases of persuasive authority" sufficient to provide Detective Carney with "fair warning" that his acts were unlawful, the mere fact that a large number of courts had recognized the existence of a right to be free from state-created danger in some circumstances as of July, 1993 is insufficient to clearly establish the unlawfulness of Detective Carney's actions.

The Supreme Court has recognized on numerous occasions that the operation of the "clearly established" standard depends substantially upon the level of generality at which the relevant legal rule is defined. *See, e.g., Wilson,* 526 U.S. at 614-15; *Anderson v. Creighton,* 483 U.S. at 640. As the *Anderson* Court explained:

> [T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of [the qualified immunity analysis]. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson, 483 U.S. at 640; *accord Wilson,* 526 U.S. at 614-15. As *Anderson* and *Wilson* make clear, assessing the "objective legal reasonableness" of an officer's actions in light of clearly established law requires a court to consider not only whether courts have recognized the *existence* of a particular constitutional right, but also on whether that right has been defined with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct. *See also Hope,* 122 S.Ct. at 2515. Accordingly, in the

instant case we must assess whether those cases from our sister circuits recognizing the existence of a substantive due process right to be free from state-created danger established the contours of that right with sufficient clarity to provide a reasonable officer in Detective Carney's position with fair warning that providing Loftin with a gun would violate McClendon's rights.

Those courts sanctioning some version of the state-created danger theory prior to 1993 might fairly be characterized, at a high level of generality, to be in agreement about the existence of a substantive due process right to be free from state-created danger. However, these courts were not in agreement as to the specific nature of that right. For example, these courts apparently disagreed as to the appropriate mental state required to hold a state actor liable for harms inflicted by third parties. While most courts agreed that something more than "mere negligence" was required to support liability, the Ninth Circuit apparently favored a "deliberate indifference" standard, *see Grubbs,* 974 F.2d at 122-23, the Sixth Circuit used a slightly different "gross negligence" test, *see Nishiyama,* 814 F.2d at 282, and the Second Circuit hinted that intent to injure might be required, *see Dwares,* 985 F.2d at 99. In addition, even those courts accepting the theoretical validity of the state-created danger doctrine admitted uncertainty as to its contours. *See, e.g., Freeman,* 911 F.2d at 55 (noting that "[i]t is not clear, under *DeShaney,* how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a constitutional duty to protect"). Thus, while a number of our sister circuits had accepted some version of the state-created danger theory as of July of 1993, given the inconsistencies and uncertainties within this alleged consensus of

of authorities, an officer acting within the jurisdiction of this court could not possibly have assessed whether his or her conduct violated this right in the absence of explicit guidance from this court or the Supreme Court.[12] *Accord Butera,* 235 F.3d at 653 (concluding that "as of 1997, the 'contours' of the rights created by the State endangerment concept were not settled among the circuits").

In addition, it is significant that no court in 1993 had applied the state-created danger theory to a factual context similar to that of the instant case. As the *Hope* Court recently emphasized, state officials can still be on notice that their conduct violates established law, even in novel factual circumstances. *Hope,* 122 S. Ct. at 2516. The "clearly established" prong of the qualified immunity inquiry does not require that "the very action in question [must have] previously been held unlawful." *Anderson,* 483 U.S. at 640. Nonetheless, the unlawfulness of the state official's actions "must be apparent" in light of pre-existing law to preclude the official from invoking qualified immunity. *Id.*

In the circumstances of the instant case, we cannot say that the unlawfulness of Detective Carney's particular

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[12] The reluctance of this court, in the ten years since *Salas* was decided, to embrace some version of the state-created danger theory despite numerous opportunities to do so suggests that, regardless of the status of this doctrine in other circuits, a reasonable officer in this circuit would, even today, be unclear as to whether there is a right to be free from "state-created danger." Put differently, a strong consensus of authorities in other circuits is more likely to be determinative on a subject when this circuit is *tabula rasa* on that subject than when the landscape in this circuit is littered with opinions expressing varying levels of skepticism.

actions should have been apparent to him in light of clearly established law in July of 1993. The relatively few pre-1993 state-created danger cases that were brought against law enforcement officers (as opposed to child welfare officials or hospital officials) generally involved police officers who had deliberately ignored an individual's pleas for assistance, *see, e.g., Dwares,* 985 F.2d at 96-97; *Freeman,* 911 F.2d 53-54, or abandoned an individual in a dangerous situation, *see, e.g., Gregory,* 974 F.2d 1007-09; *Wood,* 879 F.2d 586. None of these pre-1993 cases involved an officer whose alleged actions heightened a third party's ability to act in a dangerous manner, as in the instant case. The fact that the state-created danger theory was recognized at a general level in these precedents did not necessarily provide Officer Carney with notice that his specific actions created such a danger. While "general statements of the law are not inherently incapable of giving fair and clear warning," *Hope*, 122 S. Ct. at 2516 (quoting *United States v. Lanier,* 520 U.S. 259, 269 (1997)), this is not a situation where "a general constitutional rule already identified in the decisional law . . . appl[ied] with obvious clarify to the specific conduct in question." *Id.* (quoting *Lanier,* 520 U.S. at 269).[13] In such circumstances, qualified immunity should be granted "if a reasonable official would be left uncertain of the law's application to

[13] Indeed, general principles of the law are less likely to provide fair warning where, as here, applicability of the doctrine is highly context-sensitive. *Cf. Anderson,* 483 U.S. at 640-41 (reasoning that the clearly established nature of the right to be free from warrantless searches was not necessarily sufficient to clearly establish that an officer's conduct was objectively unreasonable under the particular circumstances that the officer confronted).

the facts confronting him." *Salas,* 980 F.2d at 311 (citing *Hopkins v. Stice,* 916 F.2d 1029, 1031 (5th Cir. 1990)).

In summary, even if a "consensus" of circuits had adopted some version of the state-created danger theory in July of 1993, this consensus did not at that time establish the contours of an individual's right to be free from state-created danger with sufficient clarity to provide Detective Carney with fair warning that his conduct violated that right. Accordingly, Detective Carney is entitled to qualified immunity from McClendon's § 1983 action.

V. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's summary judgment in favor of Detective Carney. We also AFFIRM the district court's summary judgment in favor of the City.

E. GRADY JOLLY, Circuit Judge, concurring:

The majority has followed a plausible approach in deciding the qualified immunity issue in this case and I concur in the analysis and result reached. However, I agree with Judge Parker's very convincing dissent to the effect that the most judicially responsible course for this en banc court to follow would be to decide the specific contours of the "state created danger" cause of action under the Due Process Clause. I regret that the majority of the court has chosen to pretermit the resolution of this question once again, leaving the bench and bar in doubt as to whether and to what extent such a cause of action exists in this circuit.

EDITH H. JONES, Circuit Judge, joined by RHESA H. BARKSDALE, Circuit Judge, concurring:

I concur in the majority opinion but would emphasize two points. First, it is unnecessary for the court to reach any broad pronouncement on the state-created danger theory of § 1983 liability because, at the level of generality represented by the facts before us, no such theory would be viable. This is why it is imperative for courts carefully to address the first question in qualified immunity analysis: whether, under existing law, the plaintiff states a claim for violation of a clearly established federal right

Second, the panel seriously erred by disregarding ten years' precedents of this court refusing to adopt the theory and instead holding that theory "clearly established" by other circuits' decisions as of 1993. No matter what was clearly established elsewhere, that theory certainly was not and is not established in this court. Fidelity to circuit precedent demands granting qualified immunity whenever the law in this circuit has remained in flux before and after the events that give rise to a particular claim. Compare *Butera v. District of Columbia,* 235 F.3d 637 (D.C. Cir. 2001).

EMILIO M. GARZA, Circuit Judge, concurs in the judgment only.

See Walton v. Alexander, 44 F.3d 1297, 1306 (5th Cir. 1995) (en banc) ("In sum, we hold that a 'special relationship' arises between a person and the state *only* when this person is involuntarily confined against his will through the affirmative exercise of state power. Absent this 'special relationship,' the state has no duty to protect nor liability from failing to protect a person under the due process clause of the Fourteenth Amendment from violence at the hands of a private actor." (emphasis added)).

ROBERT M. PARKER, Circuit Judge, joined by Circuit Judges WIENER and Harold R. DeMOSS Jr., dissenting:

What would a reasonable person think would happen if a police officer in the course of his employment takes a pistol from the evidence locker or from his desk and gives it to a gang member with a history of drug involvement who needs it for a confrontation with a drug dealer? Any reasonable person would conclude that the state created or enhanced a dangerous situation when the officer gave the pistol to the gang member. There is no dispute that the gang member, Kevin Loftin, used the pistol provided by Detective Carney to shoot the drug dealer, McClendon.

So how does one read the majority opinion, particularly in light of the fact that the majority does not reject the state-created danger theory outright? The only way to explain the majority opinion is that it clearly reflects a court that aspires to be the only circuit in the country to reject the state-created danger theory but cannot bring itself to admit it. Instead, the Court has embarked on a ten-year course of back-door rejection by assuming arguendo that the theory is viable and then finding that the victim has just not made the case. Far better it would be if this Circuit wants to embrace the extreme position of being the only circuit to reject the theory to simply say so.

In general, the majority correctly identifies two main issues in this case.[14] However, these two issues need be

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[14] First, viewing the evidence in the light most favorable to McClendon, has McClendon raised a genuine issue of material fact concerning each of the elements of his state-created danger claim. Second, if so, was it "clearly established" law at the time of the incident that a police officer who did what Carney did could be subject to

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addressed only if the state-created danger theory is a viable mechanism for recovery under § 1983 in this Circuit. The majority once again fails to resolve this initial question. Instead, it produces a convoluted opinion, compelling me to dissent.

I. IS THE STATE-CREATED DANGER THEORY A VIABLE THEORY IN THIS CIRCUIT?

The majority's Achilles' heel is its unwillingness to either adopt or reject the state-created danger theory as the law of the Circuit. Over the last ten years, at least seven state-created danger cases have arrived in our Circuit, but we have never taken a position on whether the state-created danger theory is a valid one, choosing instead to duck the issue. We simply stated in each case (without explicitly adopting or rejecting the theory) that the evidence is insufficient to raise a genuine issue of material fact concerning one or more of the elements that comprise the theory.[15] Our methodological approach – assuming arguendo for the purposes of each case that the state-created danger theory is a valid one but never explicitly rejecting or adopting it – cannot be defended and

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liability for violating the Due Process Clause of the Fourteenth Amendment.

[15] *See Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001) ("*Piotrowski II*") ; *Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir. 1997); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997); *Piotrowski v. City of Houston*, 51 F.3d 512, 515-17 (5th Cir. 1995) ("*Piotrowski I*"); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 530 (5th Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992).

leaves this area of circuit law in a perpetual state of confusion.[16]

To the untrained eye, the majority's methodological approach may appear slightly different from the tact taken by the previous seven panels that addressed state-created danger claims. Indeed, the *McClendon* majority never specifically states that it will assume arguendo, without deciding, that the theory is a viable one. However, that is precisely what the majority has done. It (1) implicitly assumes that the theory is a viable one without accepting

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[16] The majority's methodological approach would perhaps be defensible if (1) this was the first time we were presented with the state-created danger theory, the theory was clearly without merit and as a consequence unlikely to be asserted again in the district courts; and (2) little or no legal authority existed on the viability of the theory. However, neither of these circumstances are present here. First, the state-created danger claim has been asserted by litigants in the district courts in our Circuit for more than a decade and will likely continue to be asserted absent our explicit rejection of it. In fact, we ourselves have addressed this theory on at least seven different occasions. Second, a wealth of federal authority exists in our sister circuits concerning the viability of this theory. The majority's approach is further questionable given my conclusion that a couple of the Circuit's prior decisions which analyze whether a plaintiff has made out a valid state-created danger claim are not above reproach. For example, while it is true that this case presents the worst state-created danger claim we have ever seen, the behavior of the police in the *Piotrowski* case was similarly galling. The *Piotrowski* facts were so bad that a jury awarded the plaintiff $20 million, however, we had no qualms reversing. *See Piotrowski II*, 237 F.3d at 572. Moreover, in *Johnson*, we affirmed the dismissal of a state-created danger claim on a Rule 12(b)(6) motion even though further discovery could have shed light on the actual knowledge and level of culpability of school district officials in creating an allegedly dangerous environment in which a high school student was shot and killed by a non-student in the school hallways during normal school hours. *See Johnson*, 38 F.3d at 205-08 (Goldberg, J., dissenting).

or rejecting it outright; and (2) then finds that the facts do not amount to "deliberate indifference" as a matter of law.

Regardless of how the majority chooses to articulate it, this is the same analytical approach we have employed in the previous state-created danger cases and is the same analytical approach the Supreme Court has told us not to employ. The Circuit's *modus operandi* in these cases plays like a broken record – same approach, same result, and same confusion created for the district courts, state officials, and the general public concerning the Circuit's position on this important issue. In choosing to play this broken record yet again, the majority skirts the central issue in the case: Whether the substantive component of the Due Process Clause guarantees a citizen the right to be free from acts of violence inflicted by a third party when the state actor played an affirmative role in creating or exacerbating the dangerous situation that led to the citizen's injury. In failing to answer this fundamental question, the majority shirks its constitutional duty.

The Due Process Clause of the Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." It is well-established that deprivations of due process can be substantive. The substantive component of the Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams,* 474 U.S. 327, 331 (1986). However, the Supreme Court has warned us that "substantive-due-process cases [require] a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (citation omitted). Here, the

fundamental liberty interest at stake is McClendon's interest in his bodily integrity.

It is indisputable that there is a general substantive due process right to bodily integrity. *See e.g., Planned Parenthood v. Casey,* 505 U.S. 833 (1992). In a case involving sexual abuse of a public school child by her teacher, this Circuit clearly held that "[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process." *Doe v. Taylor Independent School District,* 15 F.3d 443, 450-51 (5th Cir. 1994) (*en banc*) (quoting *Shillingford v. Holmes,* 634 F.2d 263, 265 (5th Cir. 1981). The other circuits have also upheld the constitutional principle that there is a substantive due process right to be free from state-imposed violations of bodily integrity in cases involving rape and sexual harassment by police officers as well as cases involving sexual abuse of public school students by school employees. *See Rogers v. City of Little Rock,* 152 F.3d 790, 796 (8th Cir. 1998) (police officer violated a woman's substantive due process right to bodily integrity when he used his position of power as a police officer to rape her); *Plumeau v. School District # 40 County of Yamhill,* 130 F.3d 432, 438 (9th Cir. 1997) (public school students have a substantive due process right not to be sexually abused by school employees at school).

The particular question presented by the state-created danger theory is whether it is constitutionally permissible to find that a state actor's egregious conduct which creates a "special danger" that the citizen's bodily integrity will be physically violated by a third party is tantamount to the state actor "occasioning" the damage to the individual's bodily integrity even though the state does not commit the actual physical injury itself. In my view, the substantive

due process right to bodily integrity can extend to cover such a situation as long as the state actor engages in affirmative conduct which creates the danger.

In *Butera v. District of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001), the D.C. Circuit held that "under the State endangerment concept, an individual can assert a substantive due process right to protection by the District of Columbia from third-party violence when District of Columbia officials affirmatively act to increase or create the danger that ultimately results in the individual's harm."[17] The implication from this holding is that the constitutional duty to protect the individual's bodily integrity only arises when the state takes affirmative steps to create the danger for the individual. Thus, the actual constitutional violation occurs when the state fails to protect the individual from the dangers the state has made of its own creation. In other words, the state "occasions" the damage to the individual's bodily integrity because it fails to protect the individual from a danger of its own creation. The rationale for equating state acts which impose direct physical injury on an individual with affirmative conduct by the state which creates or increases the danger that a private party will impose direct physical injury to an individual is straightforward. As the Seventh Circuit stated, "[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive;

[17] The D.C. Circuit is the last circuit to explain the rationale for recognizing a substantive due process right based upon the state-created danger theory. The *Butera* opinion is lengthy, well-reasoned and constitutes persuasive authority.

it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir. 1982).

Consequently, the linchpin for concluding that a substantive due process violation can be made out under the state-created danger theory is the "affirmative conduct" requirement. The "affirmative conduct" requirement prevents the state from being held liable for acts of omission. Similarly, the theory's requirements that the state actor must know that his actions endanger a specific individual[18] and that a direct causal connection must exist between the state actor's conduct which increases the danger and the actual injury itself[19] are commensurate with the Supreme Court's recognition that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 195 (1989).[20]

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[18] *See Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066 (6th Cir. 1998) (finding that the state must have known or clearly should have known that its actions specifically endangered an individual).

[19] *See Kneipp v. Tedder,* 95 F.3d 1199, 1208 (3rd Cir. 1996) (the harm ultimately caused by the state-created danger must be foreseeable and fairly direct).

[20] In the case at bar, the "affirmative action" element, "knowledge" element, and "causation" element are satisfied. First, Detective Carney knew that Loftin intended to use the gun in any altercation with McClendon. Thus, he had actual knowledge that McClendon was at substantial risk of injury. Second, Detective Carney engaged in affirmative conduct because he gave Loftin a deadly weapon which Loftin could use to shoot McClendon. Third, there is a direct causal connection between the injury suffered and the affirmative conduct. Detective Carney created the danger that McClendon would be shot in

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In addition to the D.C. Circuit, the other circuits have confronted this issue and have determined that constitutional liability under § 1983 can exist "where the state creates a dangerous situation or renders citizens more vulnerable to danger." *Reed v. Gardner,* 986 F.2d 1122, 1125 (7th Cir.), *cert. denied,* 510 U.S. 947 (1993). As the majority notes, the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have each accepted the state-created danger theory as a viable means of protecting a citizen's substantive due process rights.[21] My research further indicates that the remaining circuits (i.e., the First and Fourth Circuits) have expressed similar support for the theory.[22] Consequently, the state-created

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the face by giving Loftin the gun. If Carney had not given Loftin the gun, Loftin would only have had his bare fists to use as weapons in any potential altercation with McClendon. Thus, but for Carney giving Loftin the gun, Loftin likely could not have caused McClendon to suffer such severe injuries.

[21] *See* Majority Opinion, *supra,* at notes 6-7.

[22] The First Circuit has adopted the state-created danger theory as a viable means of obtaining Section 1983 relief in rare and exceptional cases. *See Frances-Colon v. Ramirez,* 107 F.3d 62, 63-64 (1st Cir. 1997) (substantive due process interest in "bodily integrity" can support a personal injury claim under Section 1983 in the rare and exceptional cases when a government employee affirmatively acts to increase the threat of harm to the claimant). In addition, the Fourth Circuit considered a state-created danger claim and noted that there may be some "point on the spectrum between action and inaction" in which the state would be implicated in the harm caused by third parties. *See Pinder v. Johnson,* 54 F.3d 1169, 1175 (4th Cir.) (*en banc*), *cert. denied,* 516 U.S. 994 (1995). This observation suggests the Fourth Circuit accepts the notion that a state actor who affirmatively acts to create a danger could be subject to constitutional liability. Indeed, in a subsequent unpublished opinion, the Fourth Circuit analyzed a state-created danger claim and indicated that the state can be liable for the acts of third parties when the state itself creates the danger. *See Stevenson v.*

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danger theory is overwhelmingly accepted in today's federal jurisprudence.

In the face of such overwhelming authority, the majority cowers. It does not have the courage to be the only federal circuit court of appeals in the nation to explicitly reject the state-created danger theory even though that is clearly what it wants to do. Although the majority refuses to take the road less traveled in a principled albeit unpopular way, it is perfectly willing to accomplish its objectives through subterfuge. The majority knows only too well how to play the game. If the Circuit never rules on whether this is a viable theory, the Circuit makes it exceedingly difficult for the district courts to rule that the Circuit law in state-created danger cases is "clearly established" for purposes of a qualified immunity analysis. Thus, state actors who engage in behavior that falls within the confines of the "state-created danger" theory will always escape liability under the majority's view no matter how egregious their behavior. That is an insidious approach to the law and I reject it outright.

The Circuit should quit hiding the ball from the public and make a decision one way or the other. It has refused.[23] However, I favor adopting, as has the rest of the country, the state-created danger theory as a viable mechanism for obtaining Section 1983 relief in this Circuit.

Martin County. Bd. of Educ., No. 99-2685, 2001 WL 98358, * 5 (4th Cir.), *cert. denied*, 122 S. Ct. 54 (2001).

[23] In refusing to make this decision, the majority attempts to create the illusion that no Circuit split exists in hopes of avoiding Supreme Court scrutiny.

II. THE CONSTITUTIONAL VIOLATION AND QUALIFIED IMMUNITY ANALYSIS

The majority opinion arrives at several conclusions that I believe are patently absurd under the facts of this case. First, the majority concludes that "while Detective Carney's actions in providing Loftin with a gun were certainly inadvisable . . . no rational trier of fact could find that Detective Carney acted with any level of culpability beyond mere negligence."[24] Second, the majority concludes that "Detective Carney's conduct was not objectively unreasonable in light of clearly established law at the time of his actions."[25] I will address each baseless conclusion in turn.

A. Carney's actions constitute deliberate indifference

I agree with the majority that in order to survive summary judgment on his substantive due process claim McClendon must produce sufficient facts from which a rational fact-finder could conclude that Detective Carney acted with culpability beyond mere negligence. Because Detective Carney had plenty of time to "deliberate" as to whether he could properly give Loftin the gun, McClendon is only required to prove that Detective Carney acted with deliberate indifference.[26] For two main reasons, I find that

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[24] *See* Majority opinion at 18.

[25] See Majority opinion at 19.

[26] The majority correctly states that a plaintiff who asserts a substantive due process violation is required to show that the state's conduct "shocks the contemporary conscience." However, in *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998), the Supreme Court

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McClendon has produced sufficient evidence from which a rational trier of fact could not avoid concluding that Carney acted with deliberate indifference to McClendon's substantive due process right.

First, McClendon gave Loftin a gun at a time when he knew the dispute between McClendon and Loftin was "at a boiling point." Detective Carney knew that Loftin wanted the gun because he desired to use it as a weapon in any altercation with McClendon. He knew that Loftin and McClendon were likely to meet at some point in time. It is true that he had no specific knowledge that they would see each other at the Hendrix Street Apartments on the night in question. However, this fact is largely irrelevant to our analysis. The "knowledge" inquiry under a deliberate indifferent analysis does not require such a level of specificity. Clearly, Detective Carney had actual knowledge that Loftin and McClendon would likely have an altercation and that violence would almost certainly ensue between the two.[27]

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intimated that the point of conscience shocking may be reached in some circumstances by proving "something more than negligence but 'less than intentional conduct, such as recklessness or gross negligence.'" (citation omitted). The Court noted that the level of culpability which can constitute "conscience shocking" is a "matter for closer calls." *Id.* It then indicated that a state official's deliberate indifference can be "constitutionally shocking" in the context of a custodial prison situation if "actual deliberation is practical." *Id.* at 851. Thus, whether the deliberate indifference standard should be applied to the instant case depends upon whether Detective Carney had actual time to deliberate. *See Butera,* 235 F.3d at 652. Because deliberation was practical for Detective Carney, the deliberate indifference standard is applicable.

[27] The record reflects that Loftin asked Carney for a gun because his own gun had been seized by the City of Columbia police department

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The majority inexplicably states that "While Detective Carney was informed that McClendon potentially posed a threat to Loftin's safety, there is no indication that Loftin had any violent intentions toward McClendon."[28] What does the majority think Loftin intended to do with the gun provided to him by Detective Carney – place it on his wall as a souvenir? Of course not, gang members who ask for guns typically have violent intentions as any competent police officer knows. The majority implies that Detective Carney was not aware that Loftin had any violent intentions towards McClendon because Detective Carney merely "loaned" the gun to Loftin for self-protection. However, the majority's suggestion that Detective Carney believed that Loftin only intended to use the gun for self-protection belies common sense and is not a fact which a rational jury would be required to accept as true. On the contrary, the record evidence indicates that Detective Carney did not give Loftin any specific instructions as to when and under what circumstances he could rightfully use the gun. Detective Carney does not appear to have placed any limitations on Loftin's use of the gun.

In short, Loftin is a gang member who serves as a confidential informant because he is involved in the drug

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as the result of an incident in which an individual either borrowed or stole Loftin's gun and used Loftin's gun to shoot McClendon's friend. Indeed, the genesis of the dispute between McClendon and Loftin appears to have been the fact that Loftin's gun was used by another person to shoot McClendon's friend. In any event, Carney did not give Loftin his own gun back, but instead gave him a different gun that had allegedly been seized by the City of Columbia as evidence pursuant to an unrelated investigation.

[28] *See* Majority Opinion at p. 18.

scene. McClendon is a drug dealer. Any officer with enough sense to be entrusted with a gun knows that if he gives a gun to a gang member with a history of drug involvement who is anticipating a confrontation with a drug dealer, there is a strong likelihood that should an altercation arise the gang member will use that gun to shoot the drug dealer, with or without provocation.

Second, Detective Carney took property held by the City of Columbia (i.e., the gun) and gave it to a confidential informant. The majority characterizes this act as "inadvisable" or perhaps "negligent." I characterize the act as criminal. My determination that Detective Carney's actions violate Mississippi criminal law completely undermines the majority's conclusion that no rational trier of fact could find that Detective Carney's actions amount to deliberate indifference.

Mississippi law criminalizes embezzlement by police officers. Miss. Code Ann. § 97-11-25 (West 2001) makes it a crime for a city police officer to "unlawfully convert to his own use any money or other valuable thing which comes to his hands or possession by virtue of his office or employment." A conviction under this statute carries with it the possibility of as much as twenty (20) years incarceration.[29]

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[29] § 97-11-25 states in total: "If any state officer or any county officer, or an officer in any district or subdivision of a county, or an officer of any city, town or village, or a notary public, or any other person holding any public office or employment, or any executor, administrator or guardian, or any trustee of an express trust, any master or commissioner, or receiver, or any attorney at law or solicitor, or any bank or collecting agent, or other person engaged in like public employment, or any other person undertaking to act for others and

(Continued on following page)

In my view, Detective Carney's action in taking the gun from the evidence drawer/locker and giving it to Loftin constituted embezzlement by a public official in violation of § 97-11-25.[30] Detective Carney's position as a police officer made him a "public official" as defined by § 97-11-25. The gun was a "valuable thing" for purposes of § 97-11-25. Detective Carney had possession of the gun "by virtue of his employment" as a "public official" as required by § 97-11-25. Finally, Detective Carney "unlawfully converted" the gun to his own use when he gave the gun to Loftin because this act was adverse to the City's ownership interests in the gun. *See Board on Law Enforcement Officer Standards and Training v. Rushing*, 752 So. 2d 1085, 1087 (Miss. Ct. App. 1999) (deputy sheriff who took a firearm that was the property of the county and pawned it for $250 committed an act that was sufficiently adverse

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instrusted [sic] by them with business of any kind, or with money, shall unlawfully convert to his own use any money or other valuable thing which comes to his hands or possession by his virtue of office or employment, or shall not, when lawfully required to turn over such money or deliver such thing, immediately do so according to his legal obligation, he shall, on conviction, be committed to the department of corrections for not more than twenty (20) years, or be fined not more than five thousand dollars ($5,000.00)."

[30] As noted earlier, the gun had been seized as evidence in an unrelated investigation by the City of Columbia police department. Thus, the City exercised proper control over the gun but held it on behalf of the rightful owner of the gun and/or the public. *See Re: Inventory of Evidence Vaults*, Miss. Att'y Gen. Op. No. 2000-0081, 2000 WL 530411 (March 10, 2000) (noting that evidence held in the custody of a law enforcement department is held in trust for the rightful owner of such evidence, and/or ultimately for the benefit of the public should such evidence become the subject of a forfeiture). Because the gun belonged to the City, Detective Carney had no legal right to dispossess the gun from the City's control.

to the county's ownership rights in the property to constitute an act of embezzlement).

B. Qualified Immunity

Because the majority determines that McClendon has not adduced sufficient facts to prove "deliberate indifference," the majority's opinion should come to a screeching halt at that point. On the contrary, however, recognizing that its conclusion that no rational jury could find the deprivation of a constitutional right defies common sense, the majority seeks to further justify its decision by alternatively holding that Detective Carney is entitled to qualified immunity because the contours of the state-created danger theory were not "clearly established" at the time of the incident.

The majority reasons that Detective Carney should not have known that giving the gun to Loftin was unlawful because (1) we did not explicitly adopt the state-created danger theory in *Salas;* (2) our sister circuits which had recognized the theory by 1993 had slight variations concerning the mental state required to hold a state actor liable for harms inflicted by third parties; and (3) these circuits had not applied the theory to this precise factual situation. I address each point in turn.

First, it is true that we had not explicitly adopted the state-created danger theory in July of 1993. However, as the majority notes, we have indicated in the past that we will look to the overall weight of authority in determining whether the law is clearly established. *See Melear v. Spears,* 862 F.2d 1177, 1185 n.8 (5th Cir. 1989). The Supreme Court has blessed this approach. *See Wilson v. Layne,* 526 U.S. 603, 617 (1999) (indicating that a

consensus of cases of persuasive authority is sufficient to put a police officer on notice of the lawfulness of his actions).

Second, the majority contends that the numerous cases which had adopted the state-created danger theory by 1993 do not constitute a "consensus of cases of persuasive authority" on this point of law because slight variations existed among the circuits concerning the level of culpability required to hold the state actor constitutionally liable. This conclusion strikes me as plainly inconsistent with the more liberal approach to the "clearly established law" inquiry as set forth in *Wilson*.

Third, the majority's suggestion that the law cannot be "clearly established" if no prior case exists which found the exact behavior engaged in by the police officer to be unlawful misconceives the purposes which underlie the "clearly established law" inquiry and is incongruent with our precedent. We explained in *Petta v. Rivera*, 143 F.3d 895, 899 (5th Cir. 1998):

> [F]or a right to be "clearly established" we require that its "contours . . . must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." It is not necessary, however, that prior cases have held the particular action in question unlawful; "but it is to say that in the light of preexisting law the unlawfulness must be apparent." (internal citations omitted).

By July of 1993, a consensus of cases of persuasive authority existed to put reasonable police officers on notice that they may violate the Constitution if (1) they create or increase a danger to a known victim; and (2) act with deliberate indifference towards the known victim during

the creation of such danger. The majority's conclusion that the unlawfulness of Detective Carney's actions should not have been apparent to him in light of the clearly established law in July of 1993 simply cannot be justified given the fact that (1) the majority of circuits had adopted the state-created danger theory by July of 1993; and (2) Detective Carney's actions violated Mississippi criminal law.

There are certain things any police officer should know will violate the Constitution even if no reported case exists which finds the action in question unlawful. As stated previously, any reasonable officer in Detective Carney's position would understand that providing Loftin with a gun created a danger that Loftin would shoot McClendon. In fact, any officer with enough sense to be entrusted with a gun knows that giving a gun to a gang member with a history of drug involvement who is anticipating a confrontation with a drug dealer is creating a dangerous situation. Thus, a reasonable officer would recognize that this type of action could result in a violation of McClendon's constitutional rights. Consequently, I would also hold that Detective Carney is not entitled to qualified immunity from McClendon's § 1983 action.

I dissent.

WIENER, Circuit Judge, concurring in Judge Parker's, dissent and further dissenting from the en banc opinion:

I concur in Judge Parker's dissent, writing a few additional lines of my own just to emphasize one point and to advance another.

First, I am as incredulous as Judge Parker that the majority can take the position that "McClendon has not

adduced any evidence suggesting that Detective Carney acted with anything other than ordinary negligence in the instant case," and that "[t]here is no indication that Detective Carney was aware that Loftin had any violent intentions toward McClendon." Not only did Carney commit an overt act of commission – an unlawful one at that – by arming Loftin (whom Carney knew to be an intimate member of the illicit drug culture), but he did so in direct response to being informed by Loftin of an impending confrontation between Loftin and McClendon that only the most naive Pollyanna could expect would be anything other than physical and violent. Given all the information that Carney had, it is this court that is being naive about the sufficiency of the evidence amounting to considerably more than negligence: recklessness and, ultimately, *deliberate indifference* to McClendon's right to inviolate bodily integrity.

More importantly to me, however, is what – with the utmost respect – I view as a misapprehension of the central issue of this case – the kind of constitutional right proffered by McClendon that was required to have been clearly established at the time if he were to avoid an adverse judgment grounded in qualified immunity. All the wrangling over "state-created danger" is a classic red herring which has led this court away from the proper analysis.

Long before the instant incident, the constitutional right to be free from state violation of bodily integrity was well established. It is that right that McClendon asserts: His bodily integrity was violated when he was ruthlessly shot in the face by Loftin with the very gun that had been unlawfully entrusted to him by Detective Carney. McClendon does not contend that Carney, as a state actor,

created the danger that produced his blinding injury; he does contend – correctly – that (1) Carney had to be totally aware of the potential of a physically violent confrontation between McClendon and Loftin, (2) Carney had to know (or at least is presumed to have known) that the act of arming Loftin was unlawful under Mississippi law, (3) the overt, unlawful act of commission in arming Loftin was undeniably reckless and thus done with deliberate indifference, and (4) Carney's state act not only increased and enhanced the likelihood that McClendon's bodily integrity would be violated; it made it a virtual certainty.

This leaves as the only open issue *not* whether the danger was state created (or even state enhanced) but whether the reckless, deliberately indifferent act of Detective Carney, as a state actor, was a producing *cause* of the violation of McClendon's constitutional right. If this case presents any legal question, therefore, it is whether there is a sufficient nexus between the deliberately indifferent state act and the violation of the citizen's right to bodily integrity. Stated differently, was the intervening action of the non-state actor, Loftin, which clearly violated the victim's bodily integrity, sufficiently causally connected to the behavior of the state actor, Detective Carney, as to constitute the legally actionable cause of the violation of McClendon's constitutional right?

We have previously held that a remote state actor can be denied qualified immunity when his deliberate indifference exposes the victim to a constitutional violation perpetrated by an interposed party, even in situations that would be non-custodial under *DeShaney*. For example, we

denied qualified immunity to the school principal in *Doe v. Taylor ISD*[31] because his deliberate indifference, in light of information no more damning than that possessed by Detective Carney, not only increased the likelihood of the young schoolgirls' bodily integrity being violated by a third party (the predatory teacher/coach whom the principal's alleged recklessness allowed to continue in a position of predation); it made the violation possible. That the teacher/coach was himself a state actor and the instant confidential informant was not is a distinction without a difference to this taxonomy. In both cases, the interposed party acted precisely as the facts clearly known to the state actor – the school principal in *Doe* and Detective Carney here – would predict. The state actor's deliberate indifference was the *sine qua non* to the constitutional violation.

Because a genuine issue of material fact is presented in this case regarding the Detective's role in the violation of McClendon's clearly established constitutional right to an inviolate bodily integrity, I respectfully dissent from the grant of qualified immunity grounded in the spurious and inapplicable issue of state-created danger. This is a garden variety case implicating the violation of a clearly established constitutional right, which violation flowed from the reckless and unlawful – deliberately indifferent – behavior of a state actor that was objectively unreasonable under the plethora of facts known to him at the time. This case should go to trial to flesh out all the facts and let the jury determine whether the deliberate indifference of Detective

[31] 15 F.3d 443 (5th Cir. 1994) (*en banc*).

Carney had a sufficient nexus with the constitutional violation suffered by McClendon, given the interposition of the confidential informant (not a state actor) who was armed by Carney and sent forth to a violent confrontation that Carney had to know was imminent.

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT.

PETER CLAYTON MCCLENDON,

Plaintiff-Appellant,

versus

CITY OF COLUMBIA; ET AL.,

Defendants,

CITY OF COLUMBIA; JAMES R. CARNEY,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed Jul. 26, 2001)

Before POLITZ, DeMOSS and STEWART, Circuit Judges.

POLITZ, Circuit Judge:

Peter McClendon appeals an adverse grant of summary judgment dismissing his claims against the City of Columbia and Officer James Carney. For the reasons assigned, we affirm in part and reverse in part.

BACKGROUND

On July 12, 1993 Kevin Loftin shot Peter McClendon with a gun he received from Officer Carney of the Columbia, Mississippi Police Department. Carney alleges that the gun which was "loaned" to Loftin had been seized by the police department in a raid on an unrelated suspect's home, and that Officer Carney had been keeping it in his desk at work. Loftin was a confidential informant for the Columbia Police Department, working directly with

Carney. Loftin had informed Carney that he was worried of a possibility of violence between himself and McClendon because McClendon was angry with Loftin for supplying a gun to someone who shot McClendon's cousin. Carney then allegedly agreed to give Loftin the gun out of his desk to use as "protection" against McClendon until Loftin was able to get another gun. Carney admittedly was aware that Loftin did not have access to a gun because Loftin's gun was in evidence for the aforementioned shooting of McClendon's cousin. Approximately one week later, Loftin allegedly used the gun he received from Carney to shoot McClendon in the face, permanently blinding him.

McClendon's instant action against Carney and the City of Columbia alleges deprivation of his substantive due process and equal protection rights. He maintains that the City's failure to train Carney with regard to the use of informants displayed a deliberate indifference to his rights, proximately causing his injury. Additionally, he claims that there was pervasive custom and policy in the City condoning the storage of evidence, weapons, and city property in accessible areas, rather than a locked and controlled room, and that this custom and policy proximately caused his injury. Finally, he claims that Carney knowingly and affirmatively created a dangerous situation by providing Loftin with a gun when he was aware that violence was likely to erupt between them. Accordingly, Loftin maintains that Carney is liable for his injuries under the "state created danger" theory of liability.

Carney moved for summary judgment after the completion of discovery. The magistrate judge granted the motion. The case against the City was set for trial but was postponed at its request. The City then sought allowance to file a motion for summary judgment out of time. That

motion was granted and the subsequent motion for summary judgment was also granted. This timely appeal followed.

ANALYSIS

We review a grant of summary judgment *de novo,* applying the same standards as the district court, while viewing all disputed facts and reasonable inferences "in the light most favorable to the nonmoving party. . . . "[1] Summary judgment is appropriate only where "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law."[2] To survive summary judgment, however, the nonmoving party is required to do more than merely allege a material issue of fact, instead he must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial."[3]

I. State Created Danger Theory

We have recognized that, "When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct, whether or not the victim was in formal state 'custody.' "[4]

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[1] *Duffy v. Leading Edge Prods.,* 44 F.3d 308, 312 (5th Cir. 1995).

[2] FED. R. CIV. P. 56(c).

[3] *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

[4] *Johnson v. Dallas Indep. Sch. District.,* 38 F.3d 198, 200 (5th Cir. 1994).

In *Johnson v. Dallas Independent School District,*[5] we discussed the history of and set forth the elements of the "state created danger" theory without expressly adopting the theory. We acknowledged that other courts uniformly have held that "state actors may be liable if they created the plaintiffs' peril, increased their risk of harm, or acted to render them more vulnerable to danger."[6]

In *Piotrowski v. City of Houston (I),*[7] we noted the basic requirements of the state created danger theory: "First, a plaintiff must show that the state actors increased the danger to her. Second, a plaintiff must show that the state actors acted with deliberate indifference."[8] In *Johnson* we noted that to establish deliberate indifference, the plaintiff must show:

> [T]he environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff.[9]

Since *Johnson,* we have continued to recognize the existence of the theory and observed that other circuits

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[5] *Id.*

[6] *Id.* at 200.

[7] *Piotrowski v. City of Houston (I),* 51 F.3d 512 (5th Cir. 1995).

[8] *Id.* at 515.

[9] *Johnson,* 38 F.3d at 201.

have found this theory to be constitutionally sound.[10] We have not heretofore explicitly adopted and enforced this theory. We do so now.

In general, state and local governments are under no affirmative duty to protect persons from the acts of private citizens. In *DeShaney v. Winnebago County Department of Social Services,*[11] the Supreme Court clearly held that:

> [O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.[12]

The Court went on to note, however, that, "It is true that in certain limited circumstances the Constitution imposes

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[10] *Piotrowski v. City of Houston (II),* 237 F.3d 567 (5th Cir. 2001) (holding that, even if theory was available in this circuit, plaintiff had not met element of theory); *Randolph v. Cervantes,* 130 F.3d 727 (5th Cir. 1997) (same); *Doe v. Hillsboro Indep. Sch. District,* 113 F.3d 1412 (5th Cir. 1997) (same); *Piotrowski v. City of Houston,* 51 F.3d 512 (5th Cir. 1995) (same).

[11] 489 U.S. 189 (1989).

[12] *Id.* at 196-197.

upon the State affirmative duties of care and protection with respect to particular individuals."[13] Other circuits have recognized two such limited circumstances – when the state has a special relationship with the person and when the state exposes a person to a danger of its own creation.[14] The latter has evolved into the state created danger theory. Most courts adopting the theory have based their decision [sic] on language from *DeShaney*:

> *DeShaney* did not rule that custody was required where the state affirmatively causes the harm. In addition to pointing out that Joshua DeShaney was not in state custody when injured, the Court noted that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *DeShaney* thus suggests that had the state created the danger, Joshua might have recovered even though he was not in custody.[15]

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[13] *Id.* at 198.

[14] *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992); *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006 (8th Cir. 1992) (en banc); *D.R. v. Middle Bucks Area Vo. Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992); *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989); *Wells v. Walker*, 852 F.2d 368 (8th Cir. 1988); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987) (*abrogated on other grounds, Lewellen v. Metropolitan Gov't of Nashville*, 34 F.3d 345 (6th Cir. 1994)); *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983).

[15] *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (*quoting DeShaney*, 489 U.S. at 201 (emphasis added)).

As we stated in *Johnson,* the key element in the state created danger theory is a determination that the state actor created the danger to the plaintiff or at least made him more vulnerable to it. If the plaintiff advances a genuine issue of material fact that a state actor created such a danger, his claim under § 1983 for a violation of due process rights should not be dismissed on summary judgment.

Johnson involved a student killed at a high school by a person not authorized to be on the campus. The evidence established that the shooter, Brown, rode a school bus to the campus that morning and was allowed to enter the school even though he was not wearing a student ID badge. There was also evidence that, although the school had installed metal detectors, they were not being used that day. We found that, assuming the state created danger theory was constitutionally sound, the pleadings in the case fell short of the high standard required for liability. We noted that the school could not be assumed to be a dangerous environment, nor was there any actual knowledge on the part of the school of the danger to the student. Finally, we found no sufficiently culpable affirmative conduct on the part of the school.[16]

Similarly in *Doe v. Hillsboro Independent School District,*[17] we found that the school would have had no duty under the state created danger theory because there was no showing of a known danger. In *Piotrowski v. City of*

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[16] *Johnson v. Dallas Indep. Sch. District,* 38 F.3d 198, 202 (5th Cir. 1994).

[17] 113 F.3d 1412 (5th Cir. 1997).

Houston (I),[18] we found that the plaintiff could not meet the elements of a state created danger theory, even if we were to adopt that theory, because she failed to demonstrate any causal connection between the City and her ultimate injury. Instead, the plaintiff merely demonstrated that certain officers increased her danger. Because the City could not be found liable under a *respondeat superior* theory, we found the plaintiff failed to support her § 1983 claim. In *Piotrowski II,*[19] we found that Piotrowski still had not met the requirements of a state created danger theory, noting that the City actors did not create the danger that Piotrowski faced.

In the case at bar, the district court determined that, because this circuit had not yet adopted the state created danger theory of liability, Carney was entitled to judgment as a matter of law. It also found that, "Even assuming that the state-created danger theory was viable in this Circuit, McClendon's claim would fail because Carney did not affirmatively place McClendon in a position of danger, stripping him of his ability to defend himself, and he did not cut off McClendon's potential sources of private aid."[20] The court cited no record evidence in support of these findings.

We must determine whether McClendon has set forth sufficient evidence to demonstrate that there is a genuine

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[18] 51 F.3d 512 (5th Cir. 1995).

[19] 237 F.3d 567 (5th Cir. 2001).

[20] Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment at 4, *McClendon v. City of Columbia,* No. 2:96CV255PG (S.D. Miss. April 20, 1999).

issue of material fact in this case regarding the elements of the state created danger theory.

The record reflects that Carney admitted to loaning a handgun to Loftin for "protection" from McClendon. It also reflects that Carney was aware that Loftin did not have his own gun at the time of the "loan." Carney admits in his deposition that McClendon had made "threats" against Loftin in his presence. Loftin testified in his deposition that when he asked Carney for the gun things were "at a boiling point." Loftin further testified that he used the gun given to him by Carney to shoot McClendon. Carney disputes this, stating that, although he did give Loftin "a gun," the gun used in the shooting was never found. McClendon provided testimony that the gun loaned to Loftin by Carney was evidence in another case that the Columbia police department was investigating. Carney disputes this, claiming that the gun he loaned Loftin belonged to Carney's father.

This case differs significantly from the cases that previously have come before us. Viewing the facts before us in the light most favorable to McClendon, as we must at this stage, we find the affirmative conduct that was missing in *Johnson,* the knowledge element missing in *Doe,* the causation requirement missing in *Piotrowski I,* and the creation of danger that was missing in *Piotrowski II.* We find more than one genuine issue of material fact regarding the elements of this theory.

This evidence supports the proposition that Officer Carney gave Kevin Loftin a gun at a time when he knew or should have known that violence was close to erupting, and at a time when he knew Loftin had no other gun in his possession. McClendon claims that Carney used his

authority to provide Loftin with a gun, thus creating an opportunity for Loftin to commit the crime, which Loftin would not have otherwise had because he did not have his own gun. If the facts alleged by McClendon are proven at trial, a reasonable trier of fact could find that Carney created a danger that Loftin would shoot McClendon, and that he contributed to an opportunity for Loftin to commit a crime which otherwise might not have existed. Accordingly, the challenged summary judgment should have been denied.

II. Qualified Immunity for Carney

Even if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable.[21] The objective reasonableness of allegedly illegal conduct is assessed in light of the rules clearly established at the time it was taken.[22] A right will be considered clearly established only when its contours are sufficiently clear so that a reasonable official would understand that what he is doing violates that right.[23] "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent."[24] Furthermore, "If reasonable public officials could differ on

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[21] *Pfannstiel v. City of Marion*, 918 F.2d 1178 (5th Cir. 1990).

[22] *Anderson v. Creighton*, 483 U.S. 637 (1987).

[23] Id. at 640. *White v. Taylor*, 959 F.2d 539 (5th Cir. 1992).

[24] *Anderson*, 483 U.S. at 640 (citation omitted).

the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity."[25]

The district court found that, "Assuming that McClendon has alleged facts sufficient to show a violation of a constitutionally protected right, he cannot show that Carney's conduct was not objectively reasonable under the circumstances, in light of clearly established law."[26] The court based this determination on the conclusion that, at the time of the shooting, July 12, 1993, the state created danger theory was not a viable theory in this circuit. Therefore, the court found, it was not clearly established law at the time of this incident.

The district court was correct in stating that, at the time of the incident, this court had only addressed the state created danger theory once, in *Salas v. Carpenter.*[27] We conclude, however, that the discussion in *Salas* was sufficient to give notice that a police officer's deliberate indifference could lead to liability for a violation of the victims's due process rights.[28] In *Salas,* we stated that:

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[25] *White,* 959 F.2d at 544.

[26] Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment at 5, *McClendon v. City of Columbia,* No. 2:96CV255PG (S.D. Miss. April 20, 1999).

[27] 980 F.2d 299 (5th Cir. 1992).

[28] *Salas,* 980 F.2d at 311 ("On the other hand, the Ninth Circuit held that it was clearly established in 1984 that a police officer's deliberate indifference, which enhances an individual's risk of being harmed by a private actor, violates due process. Plaintiffs have failed, however, to carry their burden of showing that Carpenter acted with deliberate indifference.").

> If the state actor has a requisite mental state, a due process deprivation could occur under two sets of circumstances. First, a procedural or substantive due process violation could occur if a state official causes injury by arbitrarily abusing governmental power. Second, a substantive due process violation could occur if uncommon circumstances create a duty for the state to protect a particular person. . . .
>
> We have held that a constitutional deprivation can result from "tortious conduct exceeding mere negligence but not quite rising to the level of intentional, e.g., deliberate (or conscious) indifference, recklessness, or gross negligence."[29]

We recognized that other circuits had found a denial of due process when the state creates the faced dangers. We did not reject the doctrine as unsound, rather we merely found that the officer in that case had not increased the plaintiff's "vulnerability to danger in the sense envisioned by the Court in *DeShaney*."[30]

In *DeShaney*, the Supreme Court held that state officials could not be liable for failing to protect citizens from private violence. As stated above, however, the Court was careful to note that the state had played no part in creating the danger or leaving the plaintiff more vulnerable to the danger. The clear implication of the Court's language, which was written in 1989, was that a state could be liable when it affirmatively acts to create, or

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[29] *Id.* at 307.

[30] *Id.* at 309.

increases a plaintiff's vulnerability to, danger from private violence.

Although generally in cases of qualified immunity we look to the law of this circuit and the Supreme Court to determine whether the applicable law was clearly established at the time of the constitutional violation, we are not limited to looking only at these decisions to make this determination. We have noted previously that:

> As a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions.[31]

Our examination of the law in other circuits at the time of the shooting demonstrates that numerous federal cases had recognized and adopted this theory, including several of our sister circuits.[32] At the relevant time, although many

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[31] *Melear v. Spears*, 862 F.2d 1177, 1184 n. 8 (5th Cir. 1989) (internal citation omitted).

[32] *See supra*, footnote 10.

cases had found that the requirements of the theory had not been met, no case had explicitly rejected the theory. The overwhelming authority in the United States was that this was a viable theory of law.

In *Wood v. Ostrander,*[33] a police officer arrested a drunken driver, impounded the car, and left the female passenger, Wood, stranded on the side of the road in a high crime area five miles from her home. Wood was then picked up by an unknown man who then took her to a secluded area and raped her. The Ninth Circuit found that the law was unclear regarding whether "grossly negligent or reckless official conduct that infringes upon an interest protected by the due process clause is actionable under section 1983."[34] The court then determined, however, that under *City of Canton v. Harris,*[35] a state actor acting with deliberate indifference to a citizen's safety in the face of known dangers could result in a constitutional violation. In deciding the question of qualified immunity, the court looked to the decisions of the Seventh Circuit in *White v. Rochford,*[36] *Jackson v. City of Joliet,*[37] and *Bowers v. DeVito.*[38] In those cases, the Seventh Circuit noted the difference between a state placing a man in a position of danger and then failing to protect him and a state officer merely failing to avert danger created by another. The *Wood* court found that by 1984 the law had been established in *White*

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[33] 879 F.2d 583 (9th Cir. 1989).

[34] *Id.* at 587.

[35] 489 U.S. 378 (1989).

[36] 592 F.2d 381 (7th Cir. 1979).

[37] 715 F.2d 1200 (7th Cir. 1983).

[38] 686 F.2d 616 (7th Cir. 1982).

and clearly articulated in *Bowers* and *Jackson*. The court then held that, if the facts asserted by the plaintiff were proved at trial, the officer in that case would not be entitled to qualified immunity. As a result, the court reversed the lower court's grant of summary judgment in favor of the officer.

Freeman v. Ferguson,[39] involved a claim that the police chief had directed officers not to respond to a woman's complaints that her estranged husband was violating his restraining order. The estranged husband, a close friend of the police chief, eventually killed his former wife. The Eighth Circuit found that "a constitutional duty to protect an individual against private violence may exist . . . if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action."[40] Three years later, the circuit, in an en banc decision, again affirmed the viability of this theory in *Gregory v. City of Rogers, Arkansas.*[41]

In *Dwares v. City of New York,*[42] flag-burning demonstrators alleged that police officers had violated their constitutional rights when the police officers told "skinheads" that

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[39] 911 F.2d 52 (8th Cir. 1990).

[40] *Id.* at 55.

[41] 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) ("We have held the Due Process Clause imposes a duty on state actors to protect or care for citizens in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced.").

[42] 985 F.2d 94 (2d Cir. 1993).

they would not interfere if the skinheads assaulted the demonstrators. The Second Circuit concluded that a constitutional violation had been alleged. The court explained that the police officer's [sic] affirmative conduct had made the demonstrators more vulnerable to assault, even if the police officers were under no constitutional duty to rescue the demonstrators from an assault.

We find it beyond peradventure that a police officer's actions of giving a person a weapon in a situation the officer knows or should know has a strong potential for violence constitutes deliberate indifference on the part of the officer. Considering our statements in *Salas,* the inference which can be made from *DeShaney,* and the prevailing law across the nation, it seems apparent that no reasonable public official could have believed at the time of the incident that Officer Carney's actions, if proven as alleged in the petition, were lawful. We conclude that, at the time of the shooting it was clearly established that a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed, was subject to liability for a violation of the victim's rights. Accordingly, Carney would not be entitled to qualified immunity and summary judgment was inappropriate at this stage.

III. McClendon's Claims Against the City of Columbia

McClendon alleged that the City of Columbia was liable, under § 1983, for both failure to properly train officers with regard to the appropriate use of confidential

informants and for a custom or policy of allowing evidence to be kept in the offices of individual officers.

Municipalities may be held liable under § 1983 only when an official policy or governmental custom of the municipality causes the deprivation or violation of the constitutional rights of the plaintiff.[43] In order to demonstrate a municipal custom or policy, a plaintiff must allege: "[A] pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force."[44] McClendon has failed to make a showing of such a custom or policy. He presented no evidence of a pattern of incidents injuring or endangering citizens. The evidence he presented did not establish that the alleged custom of improperly storing evidence was "general or widespread throughout the police force." Instead, all of the testimony regarding improper storage of evidence related solely to the actions of Officer Carney on a few limited occasions. His evidence, viewed in the light most favorable to him, establishes, at best, an isolated incident of injury in violation of the unwritten city policy regarding storage of evidence. The City, therefore, was entitled to summary judgment on this claim.

McClendon's claims regarding the City's failure to train its officers regarding the proper use of confidential informants also fails. The Supreme Court has stated,

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[43] *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992).

[44] *Id.* at 1278 (*quoting Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983)).

"[T]he failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."[45] We recently held in a failure to train case that the plaintiff must prove his rights were violated as a result of a municipal custom or policy of deliberate indifference to his rights.[46] In such cases, the plaintiff may prove deliberate indifference in two ways: 1) by showing that the municipality deliberately or consciously chose not to train its officers despite being on notice that its current training regimen had failed to prevent tortious conduct by its officers; or 2) showing a single incident with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training.[47]

We generally have rejected the application of the single incident showing, noting that "proof of a single incident ordinarily is insufficient to hold a municipality liable for inadequate training."[48] We have, however, allowed liability to attach for a single incident in at least one case. In *Brown v. Bryan County, Oklahoma,*[49] we found that the County was liable under the single incident exception where it failed to provide *any* training or supervision for a young, inexperienced officer with a record of recklessness. In finding that liability could attach for a

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[45] *City of Canton v. Harris,* 489 U.S. 378, 390 (1989).

[46] *Gabriel v. City of Plano,* 202 F.3d 741 (5th Cir. 2000).

[47] *Id.* at 745.

[48] *Id.* (*citing Snyder v. Trepagnier,* 142 F.3d 791, 798 (5th Cir. 1998)).

[49] 219 F.3d 450 (5th Cir. 2000).

single incident, we found that, to proceed under the exception, "the evidence must establish, under the stringent standards of the Supreme Court's pronouncements in *Bryan County,* unmistakable culpability and clearly connected causation."[80] In other words, as McClendon notes in his reply brief, the "question is whether it should have been obvious that the failure to train was likely to lead to the injury."

We find this case distinguishable from *Bryan.* Although there is no evidence that disputes McClendon's claim that the City of Columbia does not provide specific training for its officers regarding the use of informants, there is a difference between a complete failure to train, as in *Bryan,* and a failure to train in one limited area. Even if this failure to train is considered sufficiently culpable conduct, however, McClendon has failed to prove a causal connection between this failure to train and his injury. He points to no evidence demonstrating that any training on behalf of the City with regards to the use of informants would have prevented Carney from providing Loftin with the gun used in this case. His only evidence regarding this claim is an expert opinion stating that the City failed to train Carney adequately with respect to dealing with confidential informants. The expert presented no opinion regarding whether this failure to train was causally connected to the injury at issue. McClendon claims that the Chief of Police, after being made aware of Loftin's danger, failed to provide guidance or training to Carney which resulted in his decision to handle the situation by

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[80] *Id.* at 461 (*discussing Board of County Commissioners of Bryan County, Ok. v. Brown,* 520 U.S. 397 (1997)).

arming his informant. Although Carney testified in his deposition that the Chief of Police was made aware of Loftin's involvement in the shooting of McClendon's cousin, there is no evidence that his failure to take any action regarding this information actually led to Carney's decision to provide Loftin with a weapon. This is a mere conclusionary allegation. The evidence presented by McClendon in regards to this claim, even viewed in the light most favorable to him, fails to present a genuine issue of material fact. Accordingly, the district court did not err in granting summary judgment in favor of the City on this claim.

CONCLUSION

The district court properly granted summary judgment in favor of the City of Columbia with respect to the claim of custom or policy regarding storage of evidence and the claim of failure to train. We therefore AFFIRM the district court's decision in this regard.

With respect to the summary judgment in favor of James Carney, however, the district court erred in granting summary judgment. The state created danger theory is a viable theory of law in this circuit and summary judgment was improper on these grounds. Additionally, as we have found that it was clearly established at the time of the incident that creation of such a danger could lead to liability under § 1983, we cannot say, viewing the evidence in the light most favorable to McClendon, that Carney's actions were objectively reasonable. Accordingly, summary judgment was also improper on the grounds of qualified immunity. We therefore REVERSE and REMAND this

portion of the action for further proceedings consistent herewith.

AFFIRMED in part; REVERSED and REMANDED in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

PETER CLAYTON MCLENDON	§	**PLAINTIFF**
	§	
v.	§	**2:96CV255PG**
	§	
CITY OF COLUMBIA, et al.	§	**DEFENDANT**

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 20, 1999)

BEFORE THIS COURT is the Motion of the Defendant, James R. Carney, for Summary Judgment [44-1], filed in the above-captioned cause on December 31, 1998. After consideration of the Motion, Response, Rebuttal, the pleadings, and the relevant legal authority, it is the opinion of the Court that the Defendant Carney is entitled to judgment as a matter of law.

FACTS AND PROCEDURAL HISTORY

At the time of the incident giving rise to this lawsuit, Defendant James Carney was a police officer for the city of Columbia Police Department. Kelvin Loftin was "a paid informant who frequently assisted [Defendant] Carney in drug enforcement cases from May 27, 1992 through December 21, 1993." Defendant's Brief, p. 1. In early July 1993, Loftin informed Carney that he was afraid of Peter McClendon, the Plaintiff. Carney loaned Loftin a handgun for protection.

On July 12, 1993, McClendon "went to visit a relative at a house which was located across the street from Hendrix Street Apartments." Defendant's Brief, p. 2. Loftin lived at the apartments. McClendon, along with two friends, went across the street to the apartments to talk to two women. An argument between McClendon and Loftin ensued, and Loftin shot McClendon with the handgun loaned to him by Carney.

McClendon filed this lawsuit against the City of Columbia and Carney, alleging that the Defendants violated his "right to due process pursuant to 42 U.S.C. § 1983." Plaintiff's Response, p. 1. Defendant Carney filed this motion seeking summary judgment on the claim against him, contending that he did not owe a constitutional duty to McClendon and did not place McClendon in a position of danger. In addition, Carney claims that "[e]ven if Plaintiff could state a constitutional violation, [he] is entitled to qualified immunity." Defendant's Brief, p. 1.

DISCUSSION

STANDARD FOR MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56

FED. R. CIV. P. 56 permits any party to a civil action to move for a summary judgment upon a claim, counterclaim, or cross-claim as to which there is no genuine issue of material fact and upon which the moving party is entitled to prevail as a matter of law. In effect, Rule 56© [sic] provides that as a matter of law, upon admitted or established facts, the moving party is entitled to prevail. A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery

on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The movant need not negate the non-movant's claims. Instead, movant need only show the absence of evidence to support a claim on issues to which the non-movant bears the ultimate burden of proof at trial. *Id.* at 323-24. 106 S.Ct. at 2553. Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S.Ct. at 2553-54. The non-moving party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

CLAIM PURSUANT TO 42 U.S.C. § 1983:

McClendon alleges that Carney violated his substantive due process rights by "knowingly and affirmatively creat[ing] a dangerous situation for the public and fail[ing] to take reasonable steps to diffuse the danger." Plaintiff's Response, p. 4. Carney claims that he did not violate McClendon's substantive due process rights, and that even if McClendon could prove such a violation, Carney is entitled to qualified immunity.

A. SUBSTANTIVE DUE PROCESS CLAIM:

McClendon claims that "[w]here the plaintiff alleges that affirmative conduct on the part of the state enhanced the risk of harm to the plaintiff, plaintiff has stated a substantive due process claim under 42 U.S.C. § 1983."

Plaintiff's Response, p. 4. According to McClendon, Carney created the danger and means of assault by supplying the gun to Loftin; Carney's act of supplying the gun enhanced the risk of harm to McClendon.

Carney contends, however, that Plaintiff's stated-created danger theory of recovery has not been adopted by the Fifth Circuit, and therefore, Carney did not violate McClendon's substantive due process rights. Carney cites *Randolph v. Cervantis*, 130 F.3d 727, 731 (5th Cir. 1997) in support of his position. In *Randolph*, the Fifth Circuit explicitly stated that "[t]he state-created danger theory has not been adopted in this Circuit." *Randolph*, 130 F.3d at 731, *citing Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (*en banc*), *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995). Because the Fifth Circuit has not adopted this theory of liability, McClendon cannot maintain a claim based upon such theory. Therefore, Carney is entitled to judgment as a matter of law.

In *Randolph*, the Fifth Circuit noted that even if it were to adopt such a theory, then the Plaintiff in that case could not recover. The Court explained as follows:

> To prevail under the state-created danger theory, '[t]he environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.' *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994). 'The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of

> danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid.' *Id.* (quotations and citation omitted).

Randolph, at 731. Even assuming that the state-created danger theory was viable in this Circuit, McClendon's claim would fail because Carney did not affirmatively place McClendon in a position of danger, stripping him of his ability to defend himself, and he did not cut off McClendon's potential sources of private aid.

B. QUALIFIED IMMUNITY:

Carney has asserted immunity as a defense to McClendon's substantive due process claim. "Qualified immunity protects officials in the course of performance of their discretionary duties unless their conduct violates a 'clearly established [federal] statutory or constitutional right [ ] of which a reasonable person would have known.' We first determine whether a plaintiff has alleged the violation of a clearly established constitutional right. If we find a right to be clearly established, we examine the objective legal reasonableness of the official's conduct under the circumstances, 'in light of clearly established law and the information the [ ] officers possessed.' Qualified immunity thus protects an official whose conduct was objectively reasonable, even if the conduct infringed upon a constitutional right of the plaintiff." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 445 (5th Cir. 1998) (citations omitted).

Assuming that McClendon has alleged facts sufficient to show a violation of a constitutionally protected right, he cannot show that Carney's conduct was not objectively

reasonable under the circumstances, in light of the clearly established law. Prior to the incident, which occurred July 12, 1993, the only Fifth Circuit case addressing the state-created danger theory was *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992). In that case, the Court, finding that the plaintiff did not state a constitutional claim, opined that to hold the Defendant liable, the state-created danger theory would have to be expanded because the Defendant did not create the danger. *Salas*, 980 F.2d at 309. The Court also found that even if a constitutional violation had occurred, the Defendant was entitled to qualified immunity. *Salas*, at 311. Because the state-created danger theory was not a viable theory of liability in this Circuit on July 12, 1993, the Court is of the opinion that Carney's conduct on July 12, 1993, was objectively reasonable in light of the clearly established law. Carney is thus entitled to qualified immunity.'

CONCLUSION

McClendon has failed to assert a viable constitutional claim against Carney because the Fifth Circuit has not adopted the state-created danger theory of recovery. Even if the state-created danger theory provided a viable claim. McClendon could not prevail because Carney did not affirmatively place McClendon in a position of danger, and Carney did not cut off McClendon's potential sources of private aid. Even if McClendon had asserted a constitutional violation, Carney is entitled to qualified immunity.

IT IS THEREFORE ORDERED AND ADJUDGED, that for the reasons stated above, Carney is entitled to judgment as a matter of law. Defendant James

R. Carney's Motion for Summary Judgment, pursuant to FED. R. CIV. P. 56 should be, and is hereby **GRANTED**.

SO ORDERED AND ADJUDGED, this the 19th day of April, 1999.

/s/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
U. S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

PETER CLAYTON MCCLENDON	§	**PLAINTIFF**
	§	**2:96CV255PG**
v.	§	
	§	**DEFENDANTS**
CITY OF COLUMBIA, et al.	§	
	§	

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 6, 2000)

BEFORE THIS COURT is the Motion of the Defendant, City of Columbia, for Summary Judgment [64-1], filed in the above-captioned cause on November 3, 1999. After consideration of the Motion, Response, the pleadings, and the relevant legal authority, it is the opinion of the Court that the Defendant City of Columbia is entitled to judgment as a matter of law.

FACTS AND PROCEDURAL HISTORY

At the time of the incident giving rise to this lawsuit, James Carney was a police officer for the City of Columbia Police Department. Kelvin Loftin was "a paid informant who frequently assisted Carney in drug enforcement cases from May 27, 1992, through December 21, 1993." Defendant's Memorandum, p. 2. In early July 1993, Loftin informed Carney that he was afraid of Peter McClendon, the Plaintiff. Carney loaned Loftin a handgun for protection.

On July 12, 1993, McClendon "went to visit a relative at a house which was located across the street from Hendrix Street Apartments." Defendant's Memorandum, p.2. Loftin lived at the apartments. McClendon, along with two friends, went across the street to the apartments to talk to two women. An argument between McClendon and Loftin ensued, and Loftin shot McClendon ostensibly with the handgun loaned to Loftin by Carney.

McClendon filed this lawsuit against the City of Columbia and Carney, alleging that the Defendants violated his "right to due process pursuant to 42 U.S.C. § 1983." Plaintiff's Response, p. 1. The Court granted Defendant Carney's motion for summary judgment on April 20, 1999. In its motion, the City of Columbia contends that McClendon has failed to show "the existence of a[n unwritten] policy resulting in a custom in violation of his constitutional rights." Defendant's Memorandum, p. 10. In addition, the City contends that "the plaintiff cannot show a widespread practice, but only one isolated incident." Moreover, the City claims that the "actions of the City of Columbia do not amount to deliberate indifference and there is no casual [sic] connection between the City and the plaintiff's being shot." Defendant's Brief, p. 10. On the other hand, McClendon argues that "there was no such 'unwritten policy' and, even if there was an oral policy with regard to the storage of evidence, a custom had developed in which Officer Carney was allowed to store evidence in his office – an office that was, at time [sic], accessible to anyone who happened to be in the police station." McClendon's Memorandum, p. 3. In addition, according to McClendon, the City failed to train the officers with regard to the use of confidential informants and this failure constituted a deliberate indifference to the

rights of the citizens with whom the police come into contact.

DISCUSSION

STANDARD FOR MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56

FED. R. CIV. P. 56 permits any party to a civil action to move for a summary judgment upon a claim, counterclaim, or cross-claim as to which there is no genuine issue of material fact and upon which the moving party is entitled to prevail as a matter of law. In effect, Rule 56(c) provides that as a matter of law, upon admitted or established facts, the moving party is entitled to prevail. A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The movant need not negate the non-movant's claims. Instead, [sic] movant need only show the absence of evidence to support a claim on issues to which the non-movant bears the ultimate burden of proof at trial. *Id.* at 323-24, 106 S.Ct. at 2553. Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S.Ct. at 2553-54. The non-moving party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

CLAIMS PURSUANT TO 42 U.S.C. § 1983:

McClendon alleges that the City of Columbia is liable to him for the following:

> 1) the custom of allowing evidence to be kept in the offices of individual officers – offices which, at times, were accessible to anyone, and
>
> 2) the failure to train officers with regard to the proper use of confidential informants.

Plaintiff's Memorandum in Response, p. 9.

"[M]unicipalities may be liable for damages under § 1983, but only when an official policy or governmental custom of the municipality causes the deprivation or violation of the constitutional right complained of by the plaintiff. The municipal policy or custom must cause the employee to violate another's constitutional rights:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

Thus, § 1983 liability attaches 'only where the municipality itself causes the constitutional violation at issue.'" *Fraire v. City of Arlington,* 957 F.2d 1268, 1277 (5th Cir.), *reh'g denied, cert. denied,* 506 U.S. 973, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992), *quoting Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978).

A municipality "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval

through the body's official decisionmaking channels." *Monell v. Dep't of Social Services of the City of New York,* 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). "To demonstrate a municipal custom or policy under § 1983, a plaintiff must at least allege:

> a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent policy misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.

Fraire, 957 F.2d at 1278, *quoting Languirand v. Hayden,* 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied,* 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984). An isolated incident is insufficient to establish custom. *Fraire,* at 1278, *citing Rodriguez v. Avita,* 871 F.2d 552, 554 (5th Cir.), *cert. denied* 493 U.S. 854, 110 S.Ct. 156, 107 L.Ed.2d 114 (1989); *Palmer v. City of San Antonio,* 810 F.2d 514, 516 (5th Cir. 1987).

CLAIM OF VIOLATION BY CUSTOM OF ALLOWING EVIDENCE TO BE KEPT IN OFFICES OF INDIVIDUAL OFFICERS:

McClendon claims that the City of Columbia is liable to him for allowing a custom to develop in the police department whereby "Officer Carney was allowed to store evidence in his office – an office that was, at times, accessible to anyone who happened to be in the police station." Plaintiff's Brief, p. 3. According to McClendon, this custom resulted in Carney providing a gun to Kelvin Loftin, who subsequently shot and injured McClendon. McClendon contends that the "City Officials were deliberately indifferent to this custom." Plaintiff's Complaint, ¶ 26, filed July 11, 1996, attached as Exhibit A to Defendant's Motion for Summary Judgment.

The City of Columbia avers that it did not have such a custom. Instead, it contends that it had an unwritten policy "pertaining to the use of an evidence box and evidence room." Defendant's Brief, p. 3. According to the City, the policy required as follows:

> All evidence taken in, without exception, would be placed in an evidence box, which was locked. Only Detectives Carroll Bryant and James Carney had keys to the box. Evidence would be taken from the box the day after seizure and put in the evidence room, where it was logged in and out. Again, according to policy and procedure, only Carroll Bryant and Carney had keys to the evidence room. When evidence was needed for Court, Carroll Bryant would retrieve it, and sign it out on an evidence log. There was also a list which indicated evidence taken out of the evidence box and ultimately taken to the evidence room. There also existed an evidence log for items taken to the evidence room. There also existed an evidence log for items taken out of the evidence box. All weapons kept in Carney's office were listed on a weapons log.

Defendant's Brief, p. 3 (citations omitted).

To demonstrate that an act was performed pursuant to a custom, the plaintiff must show that "the relevant practice is so widespread as to have the force of law." *Board of County Commissioners of Bryan County v. Brown,* 520 U.S. 397, 404, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626, *reh'g denied,* 117 S.Ct. 2472 (1977). In support of his proposition that the practice was so widespread to constitute a custom, McClendon provided the Court with testimony from two officers who testified that Detective Carney kept evidence in his office instead of

placing the evidence in the evidence box. McClendon also noted that Carney admitted that other officers had keys to his office. In further support of his position that the practice was widespread, McClendon provided the Court with an officer's testimony that he loaned Loftin $25 in exchange for a shotgun as collateral. Loftin later reclaimed the shotgun after he repaid the officer the $25.

The City admitted that it had an unwritten custom whereby Carney would place evidence in a lock box for safekeeping until the evidence could be placed in the evidence room. The City also admitted that "Carney kept certain seized guns, guns that had been taken from arrested individuals, in his office." Defendant's Brief, p. 2. However, according to the City, "[g]uns that constituted evidence, i.e., guns to be used as evidence in court, were not kept in his office but were kept, in adherence to policy, in the evidence room under lock and key." Defendant's Brief, p. 2-3. Carney testified that any weapons kept in his office were recorded on a weapons log. Carney admitted that other officers had keys to his office, but indicated that the lock to his office was changed after he returned to his office one night and found officers in his office.

Having reviewed the pleadings, the Court is of the opinion that McClendon's allegations are insufficient to satisfy the standards for stating a cause of action under § 1983 against the City. The plaintiff must plead "specific facts, not merely conclusory allegations." *Fraire v. City of Arlington*, 957 F.2d 1268, 1278 (5th Cir.), *cert. denied*, 506 U.S. 973, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992) (citation omitted). In addition, the plaintiff "must plead specific facts with sufficient particularity to meet all the elements of recovery." *Fraire*, 957 F.2d at 1278 (citation omitted).

The Court is of the opinion that McClendon has failed to meet this standard because he has not pled specific facts with sufficient particularity to meet the elements of recovery under § 1983; McClendon has merely asserted conclusory allegations. For this reason, the Court is of the opinion that the City of Columbia is entitled to judgment as a matter of law.

Even assuming that McClendon has sufficiently plead [sic] his cause of action pursuant to § 1983 against the City, the Court is of the opinion that McClendon has failed to produce sufficient facts to show that the City employed a custom that resulted in a deprivation of federal rights. *See Fraire,* at 1278. The Court is unable to conclude that the incidents described by McClendon support a conclusion that there was a custom of handling evidence in such a manner as to constitute a deliberate indifference to the constitutional rights of citizens. These incidents do not constitute such a widespread practice to constitute force of law. The City admitted that evidence was kept in Carney's office. Carney maintained a weapons log for those weapons in his office. With regard to the gun Loftin pawned to the officer and later retrieved, no evidence has been presented that the gun originated from within the police department or that it was evidence. The officer did not originally provide the weapon to Loftin; Loftin traded the gun to the officer in exchange for $25, and later repaid the officer to redeem the gun. The foregoing circumstances are tenuous at best for establishing a custom resulting in constitutional deprivations. Moreover, the aforementioned incidents are entirely consistent with the unwritten custom of the City of Columbia for maintenance and storage of evidence. McClendon has not produced any evidence of any other incident in which an officer loaned or gave a

weapon from the police department to a non-officer. "[P]roof of a single violent incident ordinarily is insufficient to hold a municipality liable." *Snyder v. Trepagnier,* 142 F.3d 791, 798 (5th Cir. 1998). "The plaintiff must demonstrate 'at least a pattern of similar incidents in which the citizens were injured . . . to establish the official [custom] requisite to municipal liability under section 1983.'" *Snyder,* 142 F.3d at 798 (citation omitted). For this reason, the Court is of the opinion that McClendon has failed to show that the City of Columbia employed a custom of allowing evidence to be stored in such a manner as to constitute a deliberate indifference to the constitutional rights of citizens. Therefore, the City of Columbia is entitled to judgment as a matter of law.

Further assuming that McClendon has established such a custom, McClendon has failed to demonstrate that the City of Columbia was the moving force behind McClendon's injury. "[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality." *Board of County Commissioners of Bryan County v. Brown,* 520 U.S. 397, 404, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997). The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Bryan County,* 520 U.S. at 404. "That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bryan County,* at 404. McClendon has failed to establish the requisite degree of culpability and has failed to demonstrate a direct causal link between the city's alleged custom and the deprivation of federal

rights. For this reason, the City of Columbia is entitled to judgment as a matter of law.

CLAIM OF VIOLATION BY CUSTOM OF FAILING TO TRAIN OFFICERS WITH RESPECT TO THE USE OF CONFIDENTIAL INFORMANTS:

McClendon also contends that the City of Columbia should be liable to him pursuant to § 1983 for failing to train the officers with respect to the use of confidential informants. "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris,* 489 U.S. 378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). The plaintiff must prove that "(1) his rights were violated as a result of (2) a municipal custom or policy of (3) deliberate indifference to his rights." *Gabriel v. City of Plano,* No. 98-41022, 2000 WL 96019, at *2 (5th Cir. Jan. 28, 2000). "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *City of Canton,* 489 U.S. at 389. The Fifth Circuit Court of Appeals recently held the following with regard to proving a custom:

> In failure to train cases, the plaintiff can prove the existence of a municipal custom or policy of deliberate indifference to individuals' rights in two ways. First, he can show that a municipality deliberately or consciously chose not to train its officers despite being on notice that its current training regimen had failed to prevent tortious conduct by its officers. . . . Second, under the

> "single incident exception" a single violation of federal rights may be sufficient to prove deliberate indifference. . . . The single incident exception requires proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training. We have consistently rejected application of the single incident exception and have noted that "proof of a single violent incident ordinarily is insufficient to hold a municipality liable for inadequate training."

Gabriel v. City of Plano, No. 98-41022, 2000 WL 96019, at *3 (5th Cir. Jan. 28, 2000) (citations omitted). To establish that the municipality should be liable for inadequate training, McClendon has only offered the single incident, which is at issue in this case, in which Loftin obtained a gun from Carney, and later shot McClendon. The Court is of the opinion that this incident is wholly insufficient to establish inadequate training because McClendon has failed to provide proof of the possibility of recurring situations that presented an obvious potential for violation of constitutional rights and the need for additional or different police training, as required by *Gabriel v. City of Plano.* Because he has not provided such proof, McClendon has failed to establish deliberate indifference, which is a necessary element for § 1983 liability. For this reason, the Court is of the opinion that the City of Columbia is entitled to judgment as a matter of law.

CONCLUSION

McClendon has failed to allege sufficient facts to state a claim against the City of Columbia for establishing a custom of allowing evidence to be stored in such a manner

as to constitute deliberate indifference to the constitutional rights of citizens. In addition, McClendon has failed to establish that such a custom existed that deprived citizens of their constitutional rights. Moreover, McClendon has failed to establish a direct causal link between the alleged custom and the deprivation of federal rights. McClendon has also failed to establish a custom of inadequate training of the officers with respect to the use of confidential informants.

IT IS THEREFORE ORDERED AND ADJUDGED, that for the reason stated above, the Defendant is entitled to judgment as a matter of law on Plaintiff's claims. Defendant's Motion for Summary Judgment, pursuant to FED. R. CIV. P. 56 should be, and is hereby **GRANTED.**

SO ORDERED AND ADJUDGED, this the 3rd day of March, 2000.

/s/ Louis Cuirola, Jr.
LOUIS CUIROLA, JR.
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60256

PETER CLAYTON MCCLENDON,

Plaintiff-Appellant,

versus

CITY OF COLUMBIA; ET AL.,

Defendants,

CITY OF COLUMBIA; JAMES R. CARNEY,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING EN BANC

(Opinion July 26, 2001, 5 Cir., 2001, ___ F.3d ___)

(Filed Mar. 13, 2002)

BEFORE: KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, DENNIS and CLEMENT, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

PETER CLAYTON McCLENDON	:	CA#2:96CV255PG
vs.	:	
CITY OF COLUMBIA, MS; CITY OF COLUMBIA, MS POLICE DEPARTMENT; JAMES R. CARNEY; JOE SANDERS; and HAROLD BRYANT	:	

DEPOSITION OF: KELVIN LOFTIN

DATE: August 18, 1998

PLACE: Jefferson County Courthouse
Fayette, Mississippi

CERTIFIED COURT REPORTER –

MARGARET LAWSON
Certificate #1224
THE LAWSON GROUP
142 SELMA ESTATES ROAD
NATCHEZ, MISSISSIPPI 39120

(601) 446-9748

REPRESENTING JAMES CARNEY:

JON MARK WEATHERS, ESQUIRE
BRYANT, NELSON, RANDOLPH & WEATHERS
6524 U.S. HIGHWAY 98
HATTIESBURG, MISSISSIPPI 39404-8109

REPORTED BY: PEGGY LYON, CSR #1280

PATSY AINSWORTH REPORTING SERVICE
POST OFFICE BOX 1102
HATTIESBURG, MISSISSIPPI 39403-1102
(601) 582-2582

* * *

[53] Q Did you go and tell Carney about Peter McClendon?

A Him and Carroll Bryant.

Q Now, this gun he supposedly gave you, did he give it to you after you told him about Peter?

A Not at that particular moment. This was heating up. I let them know the man was fixing to try me. He was looking at my wife. He was fixing to try me sooner or later.

MS. NESTER: Are you talking about Peter?

THE DEPONENT: Yes.

MS. NESTER: I'm sorry. I didn't mean to interrupt.

THE DEPONENT: It was at a boiling point. When I told Carney about it, I didn't necessarily tell him, "Give me something to go shoot the man." But, you know, the man gave me the gun.

BY MR. BERKLEY:

Q Did you ask him for it? How did that go? Do you remember how that went down?

A I can't recall exactly how that went down.

Q Was anybody around when he gave you the gun? It was you and Carney. Was anybody else in the police station?

A In that room? The police station was full.

* * *

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

PETER CLAYTON McCLENDON — PLAINTIFF

VS. — CAUSE NO. 2:96CV255PG

CITY OF COLUMBIA,
MISSISSIPPI, AND
JAMES R. CARNEY — DEFENDANTS

DEPOSITION OF JAMES CARNEY

DATE: December 29, 1998

PLACE: 338 Church Street
Columbia, Mississippi

TIME: 2:30 o'clock p.m.

APPEARANCES:

MS. KATHRYN NESTER, ESQUIRE
511 EAST PEARL STREET
JACKSON, MISSISSIPPI 39201

COUNSEL FOR PLAINTIFF

MR. THOMAS D. McNEESE, ESQUIRE
MR. WILLIAM CALLENDER, ESQUIRE
POST OFFICE BOX 948
COLUMBIA, MISSISSIPPI 39429

COUNSEL FOR CITY OF COLUMBIA

MR. JON MARK WEATHERS, ESQUIRE
POST OFFICE DRAWER 18109
HATTIESBURG, MISSISSIPPI 39402-8109

COUNSEL FOR JAMES CARNEY

REPORTED BY: Nancy G. Binder, CSR #1337

* * *

[22] had the thing that you hang like the Mounties hang, that string around their neck, and all to it, and I found out that it belonged to a guy named Glen Dunnaway and I returned that gun to Glen. The other was a small and the best I remember was like a five shot. The best example, if you know what a lady Smith looks like, it was a small gun like a lady Smith.

Q. Okay.

A. And what blows my mind is if that is not the gun that I gave Kelvin then I don't know where that gun is.

Q. When you gave Kelvin the gun, were you in your office?

A. Yes.

Q. At the Police Station?

A. Yes.

Q. And this was during the period of time when you did have access to the evidence locker, right?

A. Yes.

Q. And during the period of time when you did keep guns that were evidence in your office area?

A. Well, again guns that were evidence, no. Not guns that were evidence. Guns that had –

Q. Now, when you say evidence, you mean definitely to be used in court?

A. Right.

Q. Okay, but guns that had been seized were kept in your office –

A. Guns that had been taken from someone could have been in my office, yes.

[23] Q. All right. Why did you loan Kelvin a gun?

A. Well, a few days before that, there was another case of a shooting up there at that project that involved – I can't tell you, I can't remember the name of one of the guys – but one of the persons involved was a Robert Jackson, a young fellow, and the reason I remember that name is because there is also a drug dealer we were after also named Robert Jackson. This other guy, who I think was a cousin or something of Cheetah's girlfriend, had taken her – the girlfriend's children swimming or something. He come back into the project and he and Robert Jackson had gotten into an altercation and Robert Jackson evidently brought out a gun or something because the other guy, the cousin, went into Cheetah and his girlfriend's apartment and got Cheetah's gun, then went outside and in the battle Robert Jackson was shot in the side. This is where Peter Mac enters into it. He came down to the Police Station – I think it was the afternoon of the same day. He and this Robert Jackson were friends or something, and Peter Mac came down there and in mine, and I believe Carroll Bryant's, presence – I can tell you it was standing there just outside the door of the Police Station, just inside the door, the main front door there, he made some threats toward Cheetah. You know, in talking to him he shouldn't have let him have the gun, that was my bro or something like that, you know. I don't remember the exact words or something along that line. I remember Carroll and I – I got Cheetah to come down to the Police

Station and Carroll and I – and I believe it was back in Carroll's office – in view of the threat that Peter Mac had made, we talked Cheetah into leaving town. I don't remember if he stayed one night or two nights or three nights, but he went out to his girlfriend's mother's and stayed. You know, to give Peter Mac a chance to cool off. And when he had come back in, he came into my office wanting to get his gun. Of course, we had it as

* * *